



# **Retail Shop Leases Amendment Bill 2015**

**Report No. 9, 55th Parliament**

**Education, Tourism and Small Business Committee**

**February 2016**



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## Education, Tourism and Small Business Committee

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## Abbreviations and glossary

the Act	<i>Retail Shop Leases Act 1994</i>
the Bill	Retail Shop Leases Amendment Bill 2015
the department	Department of Justice and Attorney-General
LSA	<i>Legislative Standards Act 1992</i>
the Attorney-General	Attorney-General and Minister for Justice and Minister for Training and Skills
the Treasurer	Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport
the 2014 Bill	Retail Shop Leases Amendment Bill 2014
the 2015 Bill	Retail Shop Leases Amendment Bill 2015
QLS	Queensland Law Society
Options Paper	Review of the <i>Retail Shop Leases Act 1994</i> , options paper, May 2013, Department of Justice and Attorney-General
Reference Group	The Reference Group for the statutory review of the <i>Retail Shop Leases Act 1994</i> consisted of industry representatives tasked to identify areas of stakeholder consensus, difference and compromise
Statutory Review	Report on statutory review of the <i>Retail Shop Leases Act 1994</i> , November 2014, Department of Justice and Attorney-General
PCA	Property Council of Australia



## Chair's foreword

On behalf of the Education, Tourism and Small Business Committee of the 55th Parliament of Queensland, I present this report on the Retail Shop Leases Amendment Bill 2015.

The Bill was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice and Minister for Training and Skills on 13 October 2015. The committee was required to report to the Legislative Assembly by 5 February 2016.

The Bill gives effect to the outcome of the 2011 statutory review of the *Retail Shop Leases Act 1994*.

In considering the Bill, the committee's task was to consider the policy to be given effect by the Bill, and whether the Bill has sufficient regard to the fundamental legislative principles in section 4 of the *Legislative Standards Act 1992*. Those principles include whether legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

On behalf of the committee, I thank those who made written submissions on this Bill. Thanks also to officials from the Department of Justice and Attorney-General who briefed the committee, those who made submissions, the committee's staff, and the Technical Scrutiny Secretariat.



Scott Stewart MP  
**Chair**

## **Recommendations**

### **Recommendation 1** **2**

The committee recommends that the Retail Shop Leases Amendment Bill 2015 be passed.

### **Recommendation 2** **7**

The committee recommends that during the second reading debate, the Attorney-General inform the House of the likely commencement date and how businesses and stakeholders will be informed of their obligations.

### **Recommendation 3** **8**

The committee recommends that during the second reading debate, the Attorney-General inform the House how the department intends to monitor the exclusion of retail leases over 1000m<sup>2</sup> and whether this issue will form part of the next seven year review of the Act.

### **Recommendation 4** **10**

The committee recommends that during the second reading debate, the Attorney-General inform the House whether further consideration has been given to the Queensland Law Society's proposal for amendment to new section 11A and if so, the outcome.

### **Recommendation 5** **12**

The committee recommends that during the second reading debate, the Attorney-General inform the House of the outcome of the further consideration of a potential amendment to clauses 21C and 21D.

### **Recommendation 6** **14**

The committee recommends that during the second reading debate, the Attorney-General inform the House if further consideration has been given to the Queensland Law Society's concerns about proposed section 21F, and if so, the outcome of that consideration.

### **Recommendation 7** **22**

The committee recommends that during the second reading debate, the Attorney-General inform the House what consideration is being given to the North Queensland Airports concerns about potential limits on the hours of operation of retail businesses and the potential to erode existing retail lease provisions.

## 1 Introduction

### 1.1 Role of the committee

The Education, Tourism and Small Business Committee (the committee) was established by resolution of the Legislative Assembly on 27 March 2015. The committee consists of three government and three non-government members.

The committee's areas of portfolio responsibility are:

- education, and
- tourism, major events, small business and the Commonwealth Games.<sup>1</sup>

In relation to its responsibility to examine Bills, section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill
- the application of the fundamental legislative principles to the Bill.

### 1.2 Referral of the Bill

The Retail Shop Leases Amendment Bill 2015 (the Bill) was introduced into the Legislative Assembly on 13 October 2015 by the Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills and initially referred to the Legal Affairs and Community Safety Committee. The Committee of the Legislative Assembly varied the committee responsibility for the Bill to the Education, Tourism and Small Business Committee, as advised to the House on 13 October 2015. The committee was required to report to the Legislative Assembly by 5 February 2016.

### 1.3 Former Retail Shop Leases Amendment Bill 2014

An earlier Retail Shop Leases Amendment Bill 2014 (the 2014 Bill) was introduced into the Legislative Assembly on 25 November 2014 and referred to the Legal and Community Safety Committee. The main purpose of the Bill, like the 2015 Bill, was to implement the outcomes of the statutory review of the *Retail Shop Leases Act 1994* which had begun in 2011. The Legal and Community Safety Committee's inquiry and the 2014 Bill lapsed, on dissolution of the Legislative Assembly on 6 January 2015.

The Legal and Community Safety Committee received five submissions about the 2014 Bill by the closing date of 2 January 2015. No public briefings or hearings were held on the 2014 Bill.

### 1.4 Committee inquiry process

The committee requested a written briefing on the Bill from the Department of Justice and Attorney-General (the department), including a summary of the differences between the 2014 and 2015 Bills. The briefing was provided on 21 October 2015 and is published on the inquiry web page.

The committee invited submissions by notice on its website, and to subscribers and by directly inviting submissions from 51 stakeholder organisations. Six submissions were received by the closing date of 24 November 2015 and a late submission was received on 2 December 2015.

The submissions accepted by the committee and authorised for publication are available on the committee's webpage at <http://www.parliament.qld.gov.au/work-of-committees/committees/ETSBC/inquiries/current-inquiries/Retail-Shop-Leases-Amendment-Bill-2015>.

The committee determined not to hold a public briefing or hearing on the Bill given the extensive public consultation undertaken since 2011.

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<sup>1</sup> Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly*, effective from 31 August 2004 (amended 17 July 2015).

### **1.5 Should the Bill be passed?**

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed. The committee considered the Bill, information provided by the department and the information and views expressed in submissions.

After considering the policy issues discussed in this report, and considering whether the Bill has sufficient regard to the fundamental legislative principles, the committee recommends that the Bill be passed.

**Recommendation 1**

The committee recommends that the Retail Shop Leases Amendment Bill 2015 be passed.

## 2 Background to the Bill

### 2.1 Former Act and introduction of the current legislation

Regulation of the retail tenancies market has received considerable attention in Queensland and nationally for some decades. Consultation with stakeholders appears to have been a hallmark of the legislation during this time. After the introduction of the Retail Shop Leases Bill in 1983 the responsible Minister said the Bill was:

*.. one of the most important Bills to come before this House for some time. ... which in effect, is the culmination of several years of negotiation, discussion and submission between interested parties involved in the matter of leasing arrangements.*<sup>2</sup>

The Retail Shop Leases Act 1984 was passed and ten years later the then Minister described the approach to a review of the 1984 Act:

*The approach adopted in the position paper represents a continuation and a further refinement of the basic philosophy underpinning the original Act. This philosophy seeks to establish the basic ground rules for retail shop leasing rather than taking a prescriptive regulatory approach.*<sup>3</sup>

Some of the issues considered in the 1984 review are similar to those in the most recent review of the Act, which led to the Bill that is the subject of this report. In 1993 the Minister told the Legislative Assembly that it was proposed to strengthen provisions about outgoings, enhance information disclosure, and restrict the types of outgoings that can be charged to tenants. In addition, multiple rent reviews and ratchet clauses in leases were proposed to be removed, and market rent valuation process improved.<sup>4</sup>

### 2.2 Retail Shop Leases Act 1994 - review and consultation

#### 2.2.1 Statutory review of the Act

Section 122 of the Act requires a review of the operation of the Act every seven years to decide whether its provisions remain appropriate. A statutory review of the Act commenced with release of a discussion paper in late 2011 and was tabled in the Legislative Assembly in November 2014.

The statutory review of the Act included detailed consultation with major retail organisations and included the following:

November 2011: release by the Department of Justice and Attorney-General of a discussion paper, *Review of the Retail Shop Leases Act 1994*; 33 submissions were received

May 2013: release of an options paper, *Review of the Retail Shop Leases Act 1994* detailing 127 options for amendments, based on submissions received on the 2011 discussion paper; over 20 submissions were received

June 2013: Reference Group formed with task of “identifying areas of stakeholder consensus, difference and compromise”<sup>5</sup>

November 2014: *Report on statutory review of the Retail Shop Leases Act 1994*, incorporating the Reference Group Report (December 2013) was tabled in the Legislative Assembly.

<sup>2</sup> Hon Mike Ahern MP, Record of Proceedings, 22 December 1983, p 1106

<sup>3</sup> Hon Jim Elder MP, Record of Proceedings, 26 August 1993, p 3874

<sup>4</sup> *ibid*

<sup>5</sup> Retail Shop Leases Amendment Bill 2015, Explanatory Notes, p 1

### 2.2.2 Reference Group

The Reference Group which considered options for amendment of the Act was established in June 2013. The department advised the committee that the “Reference Group considered each of the 127 options for changes to the Act raised through the public consultation process.” In addition, the Reference Group “was tasked with identifying areas of stakeholder consensus, difference and compromise; and provided industry and technical input, including from the perspective of retail businesses operating in Queensland and nationally.”<sup>6</sup>

The Reference Group consisted of representatives of: the National Retail Association, the Australian Retailers Association, the Australian Property Institute, Lease 1, the Queensland Newsagents Federation, the Pharmacy Guild of Australia, the Queensland Law Society, the Large Law Firm Group and the Chamber of Commerce and Industry Queensland.<sup>7</sup>

The department advised the committee that the:

*...key guiding considerations for the Reference Group were the need for balance between safeguarding retail tenant interests, while ensuring that government regulation does not unnecessarily interfere with commercial arrangements; and identifying opportunities for reducing the regulatory and compliance burden on business.*<sup>8</sup>

In addition, “the group also considered alternatives to regulation, including leaving matters to commercial negotiation, and education or industry-driven initiatives, where appropriate.”<sup>9</sup>

The report on the statutory review of the *Retail Shop Leases Act 1994* (the statutory review) noted that “generally, where the Reference Group has reached consensus on whether or not legislative change is desirable, the government has accepted the Reference Group’s recommendations.”<sup>10</sup> For some issues, the government decided to maintain a ‘watching brief’.<sup>11</sup>

The report of the statutory review noted that:

*...the Bill also includes various consensus based technical amendments to clarify and improve the operational efficiency and effectiveness of the Act. These include amendments to: ensure the reasonableness of the required timeframes under the Act, clarify the operation of the various provisions, clarify and improve the efficiency of the current market rent determination process and remove unnecessary offences.*<sup>12</sup>

In addition,

*... some of the amendments in the Bill reflect changes considered necessary or appropriate by government in response to legal, technical or fundamental legislative principle issues raised during drafting that were not considered in the Reference Group report.*<sup>13</sup>

### 2.2.3 Submissions to the statutory review

The department advised the committee that key themes of retail tenant submissions to the statutory review were:

- security of tenure

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<sup>6</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 8

<sup>7</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 3

<sup>8</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 8

<sup>9</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 8

<sup>10</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 4

<sup>11</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 4

<sup>12</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 4-5

<sup>13</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 4-5

- occupancy costs
- market transparency; and
- disclosure and compensation.<sup>14</sup>

Landlord's submissions to the statutory review focussed on:

- clarifying the operation of the legislation to promote certainty
- removing unnecessary regulation and reducing compliance costs; and
- confining the legislation to the principle of protecting small business operators (as against larger or sophisticated business operators who are capable of safeguarding their own interests).<sup>15</sup>

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<sup>14</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 8

<sup>15</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 8

### **3 Examination of the Bill**

#### **3.1 Policy objectives of the Bill**

##### *3.1.1 Implements statutory review outcomes*

The policy objective of the Bill is to give effect to the outcome of the statutory review of the Act which commenced in 2011 and reported in 2013.

The explanatory notes state that the Bill achieves its policy objectives by:

- excluding certain leases from the operation of the Act where its application cannot be justified
- clarifying the application of the disclosure provisions in part 5 of the Act for key lease categories
- enhancing protection for lessees, including prospective purchasers of retail businesses and the release from liability for assignors and their guarantors on assignment of a lease where the assignor has complied with its disclosure obligation; and
- providing for exclusions from lessor's liability for compensation to the lessee for business disruption in certain circumstances.

##### *3.1.2 Enhanced protections*

The explanatory notes state that the Bill includes measures to enhance both lessee and lessor protection. Lessee protection measures include:

- requiring lessor disclosure to an existing lessee on renewal of a lease under an option
- facilitating appropriate disclosure to franchisees
- ensuring that a lessee is only liable to refurbish the leased shop during the lease term where the lessee gives sufficient details of the nature, extent and timing of the required refurbishment
- requiring a lessor's annual estimate and audited statement of outgoings to provide a breakdown of centre management fees
- requiring the lessor to make available to the lessee a marketing plan detailing the lessor's proposed advertising/promotion expenditure
- providing for the release of the assignor lessee to include the assignor lessee's guarantors
- making the lessor liable for the mortgagee consent costs; and
- enhancing protection for prospective purchasers of retail business through assignor disclosure.<sup>16</sup>

Enhancements to lessor protections summarised in the explanatory notes are:

- exclusion of all leases with a floor area greater than 1000m<sup>2</sup> and exclusion of the non-retail precinct
- clarification about when a lessor disclosure statement cannot be taken to be defective
- provision for lessor recovery of lease preparation costs where the lessee has negotiated, but does not proceed with, the final lease after instructing that it to be prepared
- provision that lessor's liability for compensation for business disruption does not apply where the lessor's action is a reasonable response to an emergency; and flexibility for a lease to limit a lessee's compensation claim for some specific business disturbances notified by the lessor.<sup>17</sup>

##### *3.1.3 Red tape reductions and clarifications*

The explanatory notes state that the Bill makes improvements, reduces red tape and clarifies various provisions in the Act. For example, the Bill clarifies the accounting and reporting obligations by lessors to lessees for promotion and advertising and sinking fund contributions. It excludes unnecessary procedural requirements where the State, the Commonwealth or a local government is the lessee and

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<sup>16</sup> Retail Shop Leases Amendment Bill 2015, explanatory notes p 3-4

<sup>17</sup> Retail Shop Leases Amendment Bill 2015, explanatory notes p 4



clarifies the operation of various definitions and the jurisdiction of the Queensland Civil and Administrative Tribunal (QCAT) in retail shop lease matters; and removes unnecessary offences.<sup>18</sup>

### 3.2 Clause 2 - Commencement of amendments

Clause 2 of the Bill provides that the Act commences on proclamation. Both the Shopping Centre Council of Australia (SCCA) and the Queensland Law Society (QLS) submitted that there should be a reasonable period before the Act commences. In particular, SCCA suggested that commencement should be six months after assent.<sup>19</sup>

The committee sought the department's comments regarding the commencement date. In response, the department advised that the SCCA and other reference group members "will be consulted further on the timeframe for commencement of the amendments contained in the Bill".<sup>20</sup>

The committee recommends that during the second reading debate, the Attorney-General inform the House debate, the Attorney-General inform the House of the likely commencement date and how business and stakeholders will be informed of their obligations.

#### Recommendation 2

The committee recommends that during the second reading debate, the Attorney-General inform the House of the likely commencement date and how businesses and stakeholders will be informed of their obligations.

### 3.3 Leases excluded from the operation of the Act

#### 3.3.1 Leases with a floor area greater than 1000m<sup>2</sup>

The definition of a *retail shop lease* in the current Act excludes leases of retail shops with a floor area of more than 1000m<sup>2</sup> by a listed corporation or a subsidiary.<sup>21</sup>

Clause 5 of the Bill excludes all leases more than 1000m<sup>2</sup> from the operation of the Act. The explanatory notes state that basis for this exclusion is that "the lessees are predominantly sophisticated businesses not requiring the protection of the Act."<sup>22</sup>

The department advised the committee that the exclusion of all retail shop leases with a floor area greater than 1000m<sup>2</sup>:

*... will significantly reduce unnecessary regulation of the Queensland retail sector, with minimal impact on small to medium retail businesses. The proposed exclusion also aligns with most other retail leasing jurisdictions, including New South Wales.*

*The 1000m<sup>2</sup> threshold is considered by key industry and legal stakeholders as an objective measure broadly indicative of sophisticated tenancies and consistent with the underlying principle that the Act should protect only small to medium sized retail businesses. The proposed exclusion will not affect the majority of small to medium sized retail businesses as the average floor area of a specialty store in a retail shopping centre is 100m<sup>2</sup> to 200m<sup>2</sup>. The 1000m<sup>2</sup> plus tenancies currently subject to the Act are generally large format or major chain stores with a significant corporate and network structure; or independent supermarkets located outside of major shopping centres, where there is less likelihood of*

<sup>18</sup> Retail Shop Leases Amendment Bill 2015, explanatory notes p 4

<sup>19</sup> Shopping Centre Council of Australia, Submission 2; Queensland Law Society, Submission 3

<sup>20</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 4

<sup>21</sup> *Retail Shop Leases Act 1994*, dictionary, 'retail shop lease'

<sup>22</sup> Retail Shop Leases Amendment Bill 2015, explanatory notes, p 3

*imbalance in bargaining power because the tenant is not dealing with a major institutional landlord.*<sup>23</sup>

The committee notes that the Reference Group did not reach consensus on the 1000m<sup>2</sup> floor area exclusion. The statutory report states that the:

*Amendment progressed on [the] basis of predominant Reference Group view that it will significantly reduce unnecessary regulation of the Queensland retail sector, with minimal impact on small to medium business and will align with other jurisdictions, including [New South Wales and Western Australia].*<sup>24</sup>

### 3.3.2 Listed companies

Some stakeholders argued that, in addition to excluding retail leases over 1000m<sup>2</sup>, lessors which are listed companies should be excluded from the protections in the Act.<sup>25</sup> For example, the SCCA submitted that:

*Listed retail companies usually have stores which number in the hundreds which gives them enormous bargaining strength. It is absurd that large listed Australian and international retailers are provided with the protection of the Act, particularly when these international retailers do not have the benefit of retail tenancy legislation in their home countries or in other countries in which they operate. An exclusion from the Act of retail shop leases to listed retailers would substantially reduce the regulatory burden on both retail property owners and on these retailers.*<sup>26</sup>

The committee sought further comments from the department on submitters concerns regarding the exclusion of retail leases over 1000m<sup>2</sup>. The department advised that:

*A listed corporation exclusion has not been progressed in the Bill as it was opposed by the reference group majority based on retailer and legal stakeholder concern that such exclusion would deprive a significant proportion of Queensland retail franchisees of statutory protection.*<sup>27</sup>

In addition, the department advised that it “will continue to monitor this issue with regard to relevant developments in other jurisdictions”.<sup>28</sup>

The committee considered the department’s advice and was satisfied that the exclusion of retail leases over 1000m<sup>2</sup> from the Act was appropriate in reducing red tape for the Queensland retail sector. However, the committee recommends that during the second reading debate, the Attorney-General inform the House how it intends to monitor this issue and whether it will form part of the next seven year review of the Act.

#### **Recommendation 3**

The committee recommends that during the second reading debate, the Attorney-General inform the House how the department intends to monitor the exclusion of retail leases over 1000m<sup>2</sup> and whether this issue will form part of the next seven year review of the Act.

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<sup>23</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 2

<sup>24</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, Attachment 4, p 1

<sup>25</sup> Shopping Centre Council of Australia, submission 2; Assistant Professor Johnson, submission 1

<sup>26</sup> Shopping Centre Council of Australia, submission 2, p 2

<sup>27</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 3

<sup>28</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 3

### 3.3.3 Exclusion of certain non-retail areas in a retail shopping centre

The Reference Group reported in 2014 that:

*Stakeholders have sought clarification on whether, or the extent to which, the Act covers commercial offices or non-retail service tenancies (that is, medical, legal or accounting practices, real estate agents) located in a retail shopping centre, or certain parts of the centre.<sup>29</sup>*

The committee notes that the Reference Group reported that there were “divided views on an appropriate form of exclusion”.<sup>30</sup>

Clause 5 of the Bill excludes from the operation of the Act certain leases of premises not used predominately for carrying on a retail business (non-retail lease). The explanatory notes state that a non-retail lease in a multi-level building would be excluded from the Act where 25 per cent or less of the lettable area of the building (of a single level building) or 25 per cent of that level (of a multi-level building) is used for retail business purposes.<sup>31</sup>

The department advised the committee:

*The non-retail lease exclusion will reduce red tape and compliance costs for commercial/professional tenants and their landlords by removing certain lease preparation and disclosure costs (i.e. financial and legal advice reports and pre-lease reciprocal disclosure requirements).*

*... The Bill provides certainty for existing non-retail leases located in a retail shopping centre by including a transitional provision that the Act will continue to apply to those leases, and any renewal of the lease under an option. Tenants of new non-retail leases (i.e. those entered into after commencement to which the non-retail lease exclusion applies) will be in the same position as all commercial tenants. That is, the lease conditions will be a matter for commercial negotiation between the tenant and the landlord on a case by case basis and the tenant can safeguard their position through negotiating suitable lease covenants.<sup>32</sup>*

In her submission to the committee, Assistant Professor Johnson noted that the initial impetus for the Act was to remedy the disproportionate bargaining power between large shopping centre owners and small scale tenants. She argued that the relevant consideration “is not whether the tenancy is retail or commercial in nature, but rather, the size and bargaining strength of the prospective tenant”.<sup>33</sup>

Assistant Professor Johnson proposed that large-scale commercial tenants such as banks, which have sufficient bargaining power should be excluded from the protections of the Act. She argued that “excluding small-scale commercial tenants, irrespective of where the premises are located in a shopping centre, from the application of the Act is inequitable”.<sup>34</sup>

The committee sought further advice from the department on the issues raised by Professor Johnson. The department advised the non-retail lease exclusion applies only to non-retail leases in particular areas of a retail shopping centre. The department continued:

*... the Bill does not remove statutory protection for non-retail leases situated in the main retail area of a shopping centre ([compared with], for example, an office tower located*

<sup>29</sup> The Report on statutory review of the Retail Shop Leases Act 1994, November 2014, p 12

<sup>30</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 12

<sup>31</sup> Retail Shop Leases Amendment Bill 2015, explanatory notes, p 3

<sup>32</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 2

<sup>33</sup> Assistant Professor Johnson, Bond University, submission 1, p 3

<sup>34</sup> Assistant Professor Tammy Johnson, Bond University, submission 1, p 3

*above the main retail areas, or a stand-alone medical centre in the car park of a major shopping centre complex).*<sup>35</sup>

The committee considered the department's advice and was satisfied that the exclusion of non-retail leases in areas located in particular parts of a retail shopping centre from the operation of the Act was appropriate.

#### 3.3.4 Other exclusions

Clause 5 of the Bill excludes leases where the business conducted from the premises is operated by the tenant on behalf of the lessor. The Reference Group recommended the amendment noting that it would remove an unnecessary regulatory burden for business and align with New South Wales, Victoria, Northern Territory and Tasmania.<sup>36</sup>

Clause 5 excludes from the definition of a retail lease automatic teller machines and vending machines within the common area of retail shopping centres.

### 3.4 When assignment is entered into

Clause 9 of the Bill inserts new section 11A which provides when an assignment is entered into. The clause provides that an assignment is entered into on the earlier of either the first date by which a deed of assignment is signed by the lessor, assignor and assignee; or the date the assignee, with the consent of the lessor, enters into possession of the retail shop under the assigned lease.

In its submission to the committee, the QLS argued that the terminology 'deed of assignment' is unclear and recommended that it be amended as:

*...it fails to recognise that there a number of different ways in which a lease assignment may be documented and it is therefore unclear if it would apply in a number of common transactions. It also fails to recognise that a deed or deeds may be signed by parties but may not take effect until a future date and that they may be signed but conditional upon the satisfaction of further conditions (for example the assignee providing a bank guarantee). The reference to an assignment being "entered into" is itself likely to be confusing. What it is actually referring to is an assignment "taking effect".*<sup>37</sup>

The committee sought further advice from the department in relation to the QLS's submission. In its response, the department advised that it would consider the QLS recommendation in further consultation with key stakeholders.<sup>38</sup>

The committee notes that stakeholders will be further consulted by the department and recommends that during the second reading debate, the Attorney-General inform the House whether further consideration has been given to the Queensland Law Society's proposal for amendment to new section 11A and if so, the outcome.

#### **Recommendation 4**

The committee recommends that during the second reading debate, the Attorney-General inform the House whether further consideration has been given to the Queensland Law Society's proposal for amendment to new section 11A and if so, the outcome.

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<sup>35</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 9

<sup>36</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 12

<sup>37</sup> Queensland Law Society, submission 3, p 2

<sup>38</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 5

### 3.5 Disclosure obligations

#### 3.5.1 Lessor's disclosure obligations to lessee

Clause 15 inserts new section 21B which permits a lessee (excluding a major lessee) to waive the seven day disclosure period upon receipt of appropriate legal advice. In its advice to the committee, the department said the Bill enhances commercial flexibility by streamlining the existing waiver provision for major lessees in current section 22(6) of the Act and provides a mechanism for waiver of the seven day lessor disclosure period by tenants who are not major lessees.<sup>39</sup>

In her submission to the committee, Assistant Professor Johnson supported the amendment as it "would provide the flexibility necessary for both parties to be able to proceed with the lease without unnecessary delay."<sup>40</sup>

#### 3.5.2 Sub-lessor's and franchisor's disclosure obligations

Clause 15 of the Bill inserts new section 21C which provides that for compliance with new section 21B, a prospective sub-lessor may request a disclosure statement from the lessor (a head disclosure statement). The lessor must provide the sub-lessor the head lessor disclosure statement within 28 days. In addition, the sub-lessor must pay the reasonable expenses incurred by the lessor for the preparation of the disclosure statement.

Clause 15 also inserts new section 21D which provides, in similar terms to above, that a franchisor may request a disclosure statement from the lessor who must provide the franchisor a head lessor disclosure statement within 28 days. In addition, the franchisor must pay the reasonable expenses incurred by the lessor for the preparation of the disclosure statement.

In relation to new sections 21C and 21D, the QLS submitted that:

*...a franchisor may, instead of granting a licence/contractual agreement, prefer to have a sublessor/sublessee relationship with the franchisee. However, it is not expressly clear from sections 21C and 21D which section is to apply in that event.<sup>41</sup>*

The QLS recommended amending proposed section 21C "to include granting a licence/other similar contractual right to occupy a premises".<sup>42</sup> In addition, that proposed section 21D be amended so the definition of 'franchisor' be consistent with the definition of 'franchisor' in the Franchising Code of Conduct 2014; and the reference to "wholly or predominately for carrying on a retail business" should be removed as it is inconsistent with the section 5A definition of retail shop lease.<sup>43</sup>

The committee sought further information from the department in relation to the QLS's concerns. In response, the department advised that in its view, no change is required to the provisions in the Bill as the drafting of sections 21C and 21D "is clear and reflects the above policy intent". In addition, the department advised that the Franchising Code of Conduct 2014 definition of 'franchisor' "is not necessary or appropriate for the limited purpose of the section..."<sup>44</sup>

In addition, the department advised that the QLS's recommendation will be "referred for consideration by the drafter".<sup>45</sup> The committee recommends that during the second reading debate, the Attorney-General inform the House of the outcome of this further consideration of potential amendments to proposed sections 21C and 21D.

<sup>39</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2016, p 3

<sup>40</sup> Assistant Professor Johnson, Bond University, submission 1, p 3

<sup>41</sup> Queensland Law Society, submission 3, p 3

<sup>42</sup> Queensland Law Society, submission 3, p 3

<sup>43</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 6

<sup>44</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 5- 6

<sup>45</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 6

**Recommendation 5**

The committee recommends that during the second reading debate, the Attorney-General inform the House of the outcome of the further consideration of a potential amendment to clauses 21C and 21D.

3.5.3 *Lessor's disclosure obligations to lessee in relation to a renewal under an option*

Clause 15 inserts new section 21E which provides that the lessor must give a current disclosure statement to the lessee under an option for renewal.

In its advice to the committee, the department noted that:

*Subject to tenant waiver, the Bill requires a landlord to give updated disclosure to a sitting tenant in relation to renewal under an option. The new provision establishes a mechanism to equip the tenant to make a fully informed decision whether or not to renew the lease having regard to the landlord's updated disclosure statement, before the tenant is legally bound to renew.<sup>46</sup>*

In its submission, the Property Council of Australia (PCA) stated it "did not support the introduction of this requirement".<sup>47</sup> The PCA highlighted that the Reference Group considered that the requirement would increase red tape for lessor's, "particularly as the [lessee] has a working knowledge of the centre and access of relevant information".<sup>48</sup>

The committee sought additional advice from the department on the PCA's submission. The department advised:

*The provision will enable a sitting tenant to make a fully informed decision whether or not to renew the lease having regard to the details contained in the current disclosure statement. In particular, a sitting tenant may not otherwise have knowledge of material proposals regarding the shopping centre that may seriously impact the future viability of the tenant's business (that is, the expiry of major/anchor tenancies, or the landlord's intentions regarding future centre redevelopment/refurbishment).<sup>49</sup>*

In earlier advice, the department noted:

*Industry and legal stakeholders support this provision in principle to facilitate disclosure to a sitting tenant of matters that may seriously affect the viability of their ongoing business (such as the expiry of major/anchor tenancies, landlord representations about tenancy mix and proposed centre redevelopments). These benefits outweigh the additional compliance burden for the landlord, and the information for updated disclosure would be readily available to the landlord.<sup>50</sup>*

The committee considered the department's advice and was satisfied that the new provision which requires the lessor to give a current disclosure statement to the lessee under an option for renewal protects lessees.

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<sup>46</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 3

<sup>47</sup> Property Council of Australia, submission 5, p 2

<sup>48</sup> Property Council of Australia, submission 5, p 2

<sup>49</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 2

<sup>50</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 4

### 3.5.4 Lessor's failure to comply with disclosure obligation

Clause 15 inserts new section 21F which provides that a lessee may terminate a lease, by written notice, within 6 months of entering the lease, if the lessor provided the lessee a defective disclosure statement.

The lessor may object to the lessee's termination of the lease within 14 days on the grounds that the lessor acted honestly and reasonably and ought to be excused for giving a defective statement, and that the lessee is in substantially as good a position as if the disclosure statement was not defective.

If the lessee accepts the lessor's objection notice, or the objection notice is upheld through mediation or an order of QCAT, the lease does not terminate.<sup>51</sup> If the lessee does not accept the objection notice, a retail tenancy dispute exists between the lessee and the lessor.<sup>52</sup>

In its advice to the committee, the department stated that proposed section 21F:

*Clarifies that a disclosure statement is not defective merely because it omits information that is irrelevant to the lease, or its layout does not comply with the approved form. The provision also sets out a new objection procedure for the landlord in relation to a tenant's notice to terminate for a defective statement, and makes provision for disputed terminations. These provisions ensure the practical efficacy of a tenant's entitlement to terminate for defective disclosure, narrow disputes and reduce the likelihood of a subsequent tribunal determination as to wrongful termination.*<sup>53</sup>

Assistant Professor Johnson's submission supported the amendment:

*This proposed amendment clearly articulates the threshold for termination for defective disclosure by the lessor. The proposed amendment is likely to reduce disputes over whether a lessee has a right to terminate a lease citing defective disclosure by the lessor.*<sup>54</sup>

In its submission, the QLS raised concerns with proposed section 21F as "the proposed section will permit a lessor to object to a lessee's termination and, ultimately, require the matter to be determined by QCAT".<sup>55</sup> Their submission stated:

*If a [lessor] gives [an objection notice], the lessee is left in an untenable position until the matter is resolved (which may take some time). By giving an objection notice, in many cases, the tenant will be obliged to proceed with fitting out the premises and to start paying rent. Once that is done, commercially the lessee will have no option but to proceed with the lease regardless of QCAT's determination.*<sup>56</sup>

The committee sought additional information from the department in relation to the QLS's concerns. In response, the department advised:

*The objection/dispute provisions (which are based on an equivalent provision in the Victorian retail leasing legislation) are intended to ensure the practical efficacy of a tenant's entitlement to terminate for effective disclosure, narrow termination disputes, and reduce the likelihood of a subsequent determination by QCAT as to wrongful termination by the tenant.*<sup>57</sup>

In addition, the department advised, "the QLS's concerns will be considered in further consultation with key stakeholders".

<sup>51</sup> Retail Shop Leases Amendment Bill 2015, Clause 21F (9)

<sup>52</sup> Retail Shop Leases Amendment Bill 2015, Clause 21F (8)

<sup>53</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 4

<sup>54</sup> Assistant Professor Johnson, Bond University, submission 1, p 3

<sup>55</sup> Queensland Law Society, submission 3, p 4

<sup>56</sup> Queensland Law Society, submission 3, p 5

<sup>57</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 6

The committee recommends that during the second reading debate, the Attorney-General inform the House if further consideration has been given to the QLS concerns about proposed section 21F, and if so, the outcome of that consideration.

**Recommendation 6**

The committee recommends that during the second reading debate, the Attorney-General inform the House if further consideration has been given to the Queensland Law Society's concerns about proposed section 21F, and if so, the outcome of that consideration.

3.5.5 *Disclosure on assignment of lease*

Clause 16 amends section 22B of the Act. The department clarified that the proposed amendment provides that, for an assignment of a lease that is related to a contract for sale of the assignor's business, a disclosure statement must be provided on the day on which the assignee enters into the agreement. The department noted that "this will ensure that the incoming retailer receives the benefit of disclosure before they are legally bound to take the assignment of lease."<sup>58</sup>

The department further advised that for "assignments that are not related to a business sale contract, the status quo continues, [that is] the assignor is to give disclosure at least seven days before the landlord is asked to consent to the assignment."<sup>59</sup>

The QLS submitted:

*...there is an issue with the existing assignor disclosure regime in that, in most circumstances, the Act requires disclosure about the lease to be made **after** the prospective assignee has signed a binding contract to take an assignment of the lease. The Society is therefore supportive of the amendment to require disclosure to be made **before** a prospective assignee enters into a contract to purchase the assignor's business. However the requirement that disclosure be made at least 7 days before a contract is entered into is overly restrictive and likely to make it much harder for a small business owner to sell his or her business. It is sufficient to require that disclosure is made before a contract is entered into (which the Society notes is common in many other forms of statutory pre-contract disclosure – for example a disclosure statement required to be given prior to the sale of a unit under the Body Corporate and Community Management Act 1997). There should at least be an ability to waive the 7 days notice requirement consistent with the proposed section 21B(2) in relation to pre-lease disclosure although the latter solution would impose additional red tape which in the Society's view is not necessary.<sup>60</sup>*

The committee sought additional information from the department in relation to the QLS's concerns. In response, the department advised that the seven day assignor disclosure period:

*... is intended to safeguard unsophisticated small business operators (who are prospective assignees) by ensuring a reasonable minimum period for the assignee to consider and receive appropriate advice on the information in the assignor disclosure statement before signing a sale contract that binds them to take an assignment of the lease.<sup>61</sup>*

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<sup>58</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 4

<sup>59</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 4

<sup>60</sup> Queensland Law Society, submission 3, p 5, emphasis added

<sup>61</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 7



In addition, the department stated that its “view is that a provision for termination of a business sale contract is beyond the scope of the Act and that the QLS recommendation...to the committee would not adequately safeguard prospective assignees, including in relation to distressed business sales.”<sup>62</sup>

The committee considered the department’s comments and was satisfied that clause 16 was appropriate as it provided protection to safeguard the rights of small-scale lessees.

### 3.6 Rent

#### 3.6.1 Introduction

The Act currently provides for minimum lease standards regarding rent, including:

- the timing and basis of rent reviews, and opting out by major lessees
- determination of the current market rent on request of the lessee who proposes to renew or extend a lease at the current market rent, and
- determination of the market rent by a specialist retail valuer if the parties cannot agree.

#### 3.6.2 Rent reviews – basis and opting out

Section 27 of the Act sets out the timing and the bases for rent reviews for retail leases.<sup>63</sup> It provides that a rent review must have only one basis, or a combination of two of the bases specified in the Act (for example: the current market rent; a fixed percentage of base rent; or a fixed actual amount). The Act also provides that a lessee with five or more retail shops nationally (a major lessee) may opt out of these rent review provisions by giving the landlord a written notice that they have received appropriate legal and financial advice, and notifying the lessor before entering into the lease.<sup>64</sup>

The 2013 Options Paper canvassed possible amendments to the implied rent review provisions, which were then considered by the Reference Group. In November 2014 the statutory review report stated that the Reference Group:

- reached consensus that no change was needed to section 27(5)(g) which provides that a rent review should be on one basis or a combination of two of the specified bases. The review report stated there was industry acceptance that the rent review formula could comprise two or more bases, and the bases for rent review are a matter for commercial negotiation<sup>65</sup>
- did not reach agreement about amendment of the opt out arrangements for major lessees in section 27(8).

The Bill proposes simplified drafting of section 27(1) and amendment of section 27(8) regarding notice requirements for a major lessee who wishes to opt out of the rent review provisions. The proposed amendment to section 27(8) would require a major lessee to notify the lessor that sections 27(2) to 27(7) do not apply to the lease. If a major lessee gives a notice of this type, a new subsection 36(2) clarifies that a lease is not void if it includes provisions that give a party discretion about which rent review calculations will apply, or provide for the rent to be the highest from two or more methods of calculating the rent.<sup>66</sup>

The PCA submitted that the “proposed amendments would allow major lessee’s the opportunity to opt out of void rent review provisions” and that “this opportunity should be extended to all lessee’s.”<sup>67</sup>

<sup>62</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 7

<sup>63</sup> Section 18 of the *Retail Shop Leases Act 1998* provides that a duty or entitlement conferred on a lessor or lessee under the Act is taken to be included in a retail lease.

<sup>64</sup> *Retail Shop Leases Act 1994*, section 27(8)

<sup>65</sup> *Review Report*, December 2014, p.38

<sup>66</sup> Retail Shop Leases Amendment Bill 2015, clause 30

<sup>67</sup> Property Council of Australia, Submission 5, p 2

The committee sought additional formation from the department in relation the PCA's submission. In response, the department explained that:

*The existing major lessee opt out provision is considered appropriate as major lessees are sophisticated tenants who would reasonably be expected to negotiate mutually acceptable rent review provisions with their landlords...*

*The Bill does not include the amendment sought by the [Property Council of Australia] to allow tenants who are not major lessees to opt out of the implied rent review provisions (and to clarify that an otherwise prohibited ratchet or rent review provision in the lease is not void) to maintain existing protection for unsophisticated retail tenants. The amendments sought by the [Property Council of Australia] were not supported by the review reference group majority and there are no equivalent provisions in other State/Territory retail leasing legislation.<sup>68</sup>*

The department advised that it "will keep a watching brief on this issue having regard to developments in other jurisdictions".<sup>69</sup>

The committee considered the department's response and was satisfied that the Act provides appropriate protection for small scale lessees who do not have the bargaining power of larger commercial lessees.

### 3.6.3 Determination of current market rent by specialist retail valuer

As noted above, a rent review may be based on the current market rent. Section 27A of the Act enables a lessee to seek an early determination of the market rent before extending or renewing a lease. If the lessor and lessee cannot agree on the current market rent, section 28 of the Act provides for a specialist retail valuer to determine the current market rent, and section 28A provides for submissions to the specialist retail valuer.

Clause 27 of the Bill proposes to amend section 28A to require the valuer to decide on a date for the lessee and lessor to make submissions to the valuer and to notify them of the date. The period for submissions must be at least 14 days; copies of submissions must be given to the other party; and a party may respond to a submission. An amendment to clause 25 clarifies that the last day that the option to extend or renew a lease is 21 days after the lessee receives notice of the current market rent determined under section 27A.

### 3.6.4 Other amendments about rent

#### Ratchet rent

The Act provides that 'ratchet rent' provisions in a lease are void.<sup>70</sup> Clause 31 inserts a new subsection 36A(2A) to provide that such a provision in a lease is not void if a major lessee has given the lessor a notice under section 28(8).

#### Turnover rent and lessee requirements

The Bill would remove requirements in the Act where the rent under a lease is or may be calculated as a percentage of turnover. Subsections 25(3) and (4) require the lessee to provide a monthly certificate specifying the business' turnover, and to provide an audited statement of turnover annually and when the lease is terminated. Those requirements would be removed by clause 22 of the Bill.

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<sup>68</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 3

<sup>69</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 3-4

<sup>70</sup> A ratchet rent provision prevents the rent decreasing under a rent review, or limits the amount of decrease, or prevents the rent review occurring so that a rent decrease is avoided or limited. *Retail Shop Leases Act 1994*, section 36A

### 3.7 Lessor's outgoings

#### 3.7.1 *The Act and outcome of the statutory review*

If a lessee is required by a retail shop lease to pay all or part of the lessor's outgoings, sections 37 and 38 of the Act specify requirements for payment. The industry Reference Group agreed that amendments to improve transparency for tenants were justified and that any amount paid by the landlord relating to an excess under the landlord's insurance policy should not be recoverable.<sup>71</sup>

"Outgoings" are defined in section 7 of the Act and include the lessor's reasonable expenses directly attributable to the operation, maintenance or repair of the centre or building and areas used in association with it; and charges, levies, premiums, rates or taxes payable by the lessor as owner or occupier of the centre or building or the land on which it is situated. Particular costs are excluded, for example, contributions to a depreciation or sinking fund, and contribution to merchants' associations and centre promotion funds.

#### 3.7.2 *Calculation of apportionable outgoings*

##### *Amendments*

Clause 32 replaces section 37 of the Act with new section 36B (definitions) and re-drafted section 37. The clause provides that a lessee under a retail shop lease is not liable to pay outgoings unless the lease specifies the outgoings payable, how the outgoings will be determined and apportioned, and how the outgoings may be recovered from the lessor. An amended definition in proposed section 37(2) provides that a lessor's "apportionable outgoings" include amounts for maintenance and promotion to the extent they are treated as part of the lessor's outgoings under the lease.

The QLS submitted that the amendment to section 37 "will significantly increase disputes between lessors and lessees"<sup>72</sup> and suggested that disputes about outgoings should be determined by QCAT. The QLS submission stated that:

*The calculation of outgoings, particularly the apportionment of costs between different parts of a centre and the extent to which different parts "may benefit from" an outgoing, can be complex. It is unclear to what extent the new section 37(1) requires the lease to specify how the outgoing will be determined...*<sup>73</sup>

The committee sought comment from the department in relation to the QLS's concern. In response, the department advised that clause 32 clarifies and updates the drafting of section 37 (2) but does not change the operation or intent. In addition the committee noted that the Act provides that QCAT can hear a retail tenancy dispute about outgoings.<sup>74</sup> The department commented that the Bill does not amend the provisions in the Act that provide QCAT with the jurisdiction to hear a retail tenancy dispute.<sup>75</sup>

The committee considered the department's response and was satisfied the replacement of clause 37 was appropriate.

Clause 33 proposes an amendment to section 38 to specify common areas that will be excluded from calculation of the apportionable outgoings. Areas to be excluded by clause 33 include storage, parking, automatic teller machines, advertisement displays and vending machines. The department advised the committee that "this provision is supported by industry stakeholders to reduce red tape for shopping centre outgoings apportionment."<sup>76</sup>

<sup>71</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 47

<sup>72</sup> Queensland Law Society, Submission 3, p 5

<sup>73</sup> Queensland Law Society, Submission 5, p 6

<sup>74</sup> Retail Shop Leases Act 1994, section 103(2)(b)

<sup>75</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 8

<sup>76</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 5

Requirements for the lessor to give the lessee an estimate of outgoings, and later an audited annual statement of outgoings are retained, in redrafted form in proposed section 38A and 38B. New section 38C, inserted by clause 33, provides that a lessor may withhold rent if a lessor does not give the lessee an outgoings estimate or an audited annual statement. This would replace a penalty in the current Act. The department advised the committee that a number of offences would be removed from the Act as they are not necessary, and the aggrieved party has access to dispute resolution under the Act.

#### *Submissions*

Two submissions raised concerns about the requirement for an audited annual statement of the lessor's apportionable outgoings in proposed section 38B.

Firstly, the PCA suggested that the requirement to provide an audited annual statement is 'onerous' for small lessors who may only own one tenancy and whose outgoings are limited to rates, water and insurance. The PCA submitted that the clause should be amended to allow the lessee to waive the requirement, which would reduce red tape.<sup>77</sup>

The committee sought additional information from the department in relation to submitters concerns. In response, the department advised that the issue would be "considered separately to the current Bill".<sup>78</sup>

The second concern raised in submissions is the clarity of clause 38B(8) which deals with an audited annual statement when there is a change of ownership of a retail shopping centre. The QLS submitted that clause 38B(8) is:

*...defective as it is not clear that the purchaser is required to provide audited statements from the date it became the owner to the end of the financial year and the previous owner is required to provide an audited statement up to the date it ceased to be owner.*<sup>79</sup>

The QLS proposed that the Bill be amended to require the previous owner to provide an audited statement to the date it ceased to be the owner, within 90 days of settlement.<sup>80</sup>

In response to QLS concerns, the department advised:

*In practice, it is a commercial matter for the previous owner and the new owner of a centre/building to make arrangements between themselves as to how the annual outgoings audit will be completed and what information will be provided by each party to allow the new owner to fulfil its obligations under the Act. It is not practicable or appropriate to regulate these matters, including to allow commercial flexibility on a case by case basis.*

*A tenant who does not receive the complete audited annual statement of outgoings for the year has recourse under the dispute resolution provisions of the Act.*<sup>81</sup>

The committee considered the department's response and was satisfied that lessees have recourse to the dispute resolution provisions under the Act should a dispute regarding an audited statement arise.

#### **3.7.3 Lessor's payments for promotion and advertising**

If a lease requires the lessee to pay for promotion and advertising, clause 35 inserts new section 40A to require the lessor to:

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<sup>77</sup> Property Council of Australia, Submission 5, p 2

<sup>78</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 4

<sup>79</sup> Queensland Law Society, submission 3, p 6

<sup>80</sup> Queensland Law Society, submission 3, p 6

<sup>81</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 9

- give the lessee a marketing plan detailing proposed spending, a month before the start of each accounting period, and
- an audited statement of expenditure for promotion within three months of the end of the accounting period.

The department advised that the lessor's requirement to provide a marketing plan and audited statement of expenditure for promotion is in line with other jurisdictions.<sup>82</sup>

### 3.8 Implied provisions for compensation

#### 3.8.1 *When compensation is payable by the lessor*

As noted above, section 18 of the Act provides that where a duty is imposed, or an entitlement is conferred on a lessor or lessee under the Act, that duty or entitlement is taken to be included in the lease. Section 19 of the Act provides that a retail shop lease is void if it purports to exclude a provision of the Act that applies to the lease.

Clauses 38 to 42 of the Bill amend the implied compensation provisions. Some provisions of the Act are relocated and the substantive amendments are summarised below.

Section 43 of the Act sets out when the lessor is liable to pay a lessee reasonable compensation for loss or damage suffered due to the actions of the lessor or person acting under the lessor's authority. Clause 39 amends section 43 to clarify that it relates to compensation payable for business disturbance.

The committee noted that the Act currently provides that a lessee's failure to give written notice outlining loss or damage does not affect the lessee's right to compensation but is taken into consideration when determining the compensation payable.<sup>83</sup>

Clause 40 of the Bill inserts new section 43AB which provides that a lessor is not liable to pay a lessee compensation for damage suffered because of reasonable action in response to an emergency. The committee notes that the Reference Group reached consensus on this issue.<sup>84</sup>

Section 43 (1) (f) of the Act provides that a lessor is liable to pay a lessee reasonable compensation for loss or damage where the lessor causes the lessee to vacate the leased shop before the end of the lease or renewal due to an extension, refurbishment or demolition of the premises.

In its report, the Reference Group noted that "clarification is required regarding the interaction between section 43 (1) (f) and the stand-alone relocation and demolition compensation provisions in Part 6 Division 9 of the Act."<sup>85</sup> Clause 40 inserts new section 43AD to clarify that the lessor is not liable to pay compensation under section 43 (1) (f) "to the extent the lessee is otherwise entitled to payment of relocation costs under section 43G or reasonable compensation under section 46K"<sup>86</sup> of the Act.

#### 3.8.2 *Limitation of compensation*

The Reference Group recommended an amendment to limit a compensation claim for a notified specific occurrence. The committee noted that the Act provides that an agreement under the lease about compensation payable is void to the extent it limits the amount.<sup>87</sup>

<sup>82</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 5

<sup>83</sup> Retail Shop Leases Act 1994, s 43 (3)e

<sup>84</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 56

<sup>85</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 55

<sup>86</sup> Retail Shop Leases Amendment Bill 2015, explanatory notes, p 13

<sup>87</sup> *Retail Shop Leases Act 1994*, section 44 (2). Clause 41 omits section 44(2) of the Act.

Clause 42 of the Bill inserts new section 44A which provides that compensation payable to a lessee is limited for an anticipated disturbance if the likelihood of the disturbance was specifically drawn to the attention of the lessee, in writing, before the lease was entered into. The notice must have included a specific description of the nature of the anticipated disturbance, an assessment of its likelihood, including an indication of the basis on which the assessment was reached and details about the timing, duration and effect of the disturbance so far as can be predicted.<sup>88</sup> An anticipated disturbance is defined in the Act to include actions by the lessor to restrict access to the lessee's shop, significant disruption and failure to rectify maintenance issues or neglecting to clean or maintain the leased retail shopping centre (or leased building containing the leased shop).<sup>89</sup>

The Reference Group noted that the proposed amendment would "reduce the regulatory burden on business by removing the existing prohibition on agreements limiting compensation."<sup>90</sup> In addition, it reflects commercial reality that the lessor and lessee may come to an agreement on compensation that is mutually beneficial in certain circumstances.<sup>91</sup>

Assistant Professor Johnson's submission supported the compensation provisions. The submission stated that "these proposed new provisions of the Act clarify the circumstances in which a lessee's ability to seek compensation from a lessor will arise."<sup>92</sup>

### **3.9 Relocation of business**

Section 46C of the Act provides that sections 46D to 43G regarding relocating a lessee's business apply to a retail shop lease.

Clause 46 is a technical amendment to current 46C which clarifies that where a retail shop lease provides for the relocation of the lessee's business during the term of the lease, sections 46D to 46G apply. Clause 47 inserts new section 46D (4) which clarifies that if a leased shop is in a retail shopping center, the alternative relocated shop must be within the center.

### **3.10 Timeframe for tenant's termination notice where lessor proposes to demolish building in which the lessee's business is situated**

Section 46I of the Act provides that a lessor can terminate a lease by giving the lessee a written notice which must be given at least six months before the termination day. Section 46J of the Act further provides that the lessee may terminate the lease earlier than the termination day by giving the lessor at least seven days written notice of an earlier termination day.

The Reference Group agreed that the lessee's notice period should be one month before it wants to end the lease.<sup>93</sup> The Reference Group noted that the extended tenant notice period reflects commercial reality in that it allows the lessee sufficient time to remove stock/fixture/fittings and also allows a reasonable timeframe in the context of the lessor's minimum notice period (six months).<sup>94</sup>

### **3.11 Lessee's liability for costs associated with lease preparation**

#### **3.11.1 Survey fees**

Section 48(2) of the Act currently provides a lessee may be required to pay survey fees associated with the registration of the lease and the lessor's reasonable expenses incurred obtaining the lessor's

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<sup>88</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 56

<sup>89</sup> Retail Shop Leases Amendment Bill 2015, clause 42 (3) (a) to (c)

<sup>90</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 56

<sup>91</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 56

<sup>92</sup> Assistant Professor Johnson, Bond University, submission 1, p 3

<sup>93</sup> Clause 46J

<sup>94</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 64

mortgagee consent. Clause 49 amends section 48 which provides that a lessee is no longer liable for these expenses.

### 3.11.2 *When lessee does not proceed with lease*

Section 48(1) of the Act provides that a lessee is not liable to pay for the lessor's legal or other expenses in relation to preparing, renewing or extending the lease.

The Reference Group noted that "stakeholder feedback to the review indicates that the silence in the Act about whether the landlord can recover these costs where the [lessee] does not proceed with the lease causes confusion and should be clarified".<sup>95</sup>

Clause 49 inserts a new section 48(3) which provides that the lessee is liable for the lessor's reasonable expenses for the preparation of a final lease if the lessee does not proceed with the lease.

In her submission, Assistant Professor Johnson supported enabling the lessor to recover the costs of preparation of a final lease if the lessee authorises preparation but refuses to sign it.

*It would be inequitable for the lessor to be restrained from recovering this cost from the lessee in circumstances where the lessee's conduct would usually (had a binding agreement to lease been signed) amount to repudiation of the contract.*<sup>96</sup>

## 3.12 Lease terms

### 3.12.1 *Refurbishment and refitting*

Clause 51 of the Bill inserts new section 50B which requires that a provision in a lease requiring the lessee to refurbish or refit the leased shop is void unless the lessee gives general details of the nature, extent and timing of the requirement.

### 3.12.2 *Trading hours*

Clause 53 of the Bill replaces section 53 to provide that a term in a lease that purports to oblige the lessee to trade outside core trading hours for a retail shopping centre is void. In addition, the new section clarifies that a lease that permits (rather than requires) the retailer to trade outside the core trading hours is not void. The department advised the committee that this amendment reflects modern shopping centre practice and mix, that is, increasingly there are lessees, such as restaurants located on the exterior of a centre, which trade outside core hours (but within the allowable trading hours) by agreement with the lessor.<sup>97</sup>

North Queensland Airports (the NQA) noted that the Bill was silent on the treatment of retail activity and trading hours on Cairns and Mackay Airport land holdings which do not have restrictions on retail lease terms (including trading hours). The NQA submitted that the Act:

*..and any other relevant statutes should be amended to reflect the current policy framework and retail operating arrangements ensuring that all retail businesses on Cairns and Mackay Airport land holdings be exempt from any requirements that may limit hours of operation and erode existing retail lease provisions.*<sup>98</sup>

The committee sought additional information from the department in relation to the NQA's submission. In response, the department advised that the existing trading hours at NQA will be unaffected as clause 53 (2) clarifies that "a clause in a lease that permits (rather than requires) the tenant to open the shop for trading outside the core hours for the centre is not void. This amendment

<sup>95</sup> The Report on statutory review of the *Retail Shop Leases Act 1994*, November 2014, p 52

<sup>96</sup> Assistant Professor Johnson, Bond University, submission 1, p 4

<sup>97</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 7

<sup>98</sup> Northern Queensland Airports, Submission 6, p 2

will clarify that tenants may trade outside of shopping centre core hours (but within the allowable trading hours under the [*Trading (Allowable Hours) Act 1990*] by agreement with the [lessor]”.<sup>99</sup>

The department however noted that “consideration is being given to the submission to the extent that it relates to matters regulated under the Act”.<sup>100</sup>

In correspondence to the Attorney-General and copied to the committee, the Treasurer, Hon Pitt MP, supported NQA’s submission. The Treasurer based his support on the Cairns and Mackay Airports not historically being subject to the Act and trading hours legislation; representations made during the competitive process to dispose of the airports which emphasised the absence of a curfew and the retail shop growth potential; and the risk of restricting trading hours.<sup>101</sup>

The committee considered the potential effects of restricted trading hours at Cairns and Mackay Airports and the impact this would have on its existing commercial dealings. In this regard, the committee recommends that during the second reading debate, the Attorney-General inform the House about government consideration of North Queensland Airports concerns about potential limits on the hours of operation of retail businesses and the potential to erode existing retail lease provisions.

**Recommendation 7**

The committee recommends that during the second reading debate, the Attorney-General inform the House what consideration is being given to the North Queensland Airports concerns about potential limits on the hours of operation of retail businesses and the potential to erode existing retail lease provisions.

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<sup>99</sup> Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships, Minister for Sport, correspondence dated 21 December 2015, p 1

<sup>100</sup> Department of Justice and Attorney-General, correspondence dated 8 January 2016, p 1-2

<sup>101</sup> Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport, correspondence dated 21 December 2015, p 1



### 3.13 Other amendments

#### 3.13.1 *Release of assignor and guarantor from the assignee's liability under the lease*

Section 50A of the Act provides that when an assignment of a retail shop lease has been entered into and the lessor, assignor and assignee have complied with their disclosure obligations under the Act, the assignor is released from any liability under the lease arising from the default of the assignee. Clause 51 replaces section 50A to provide that the assignor, and any guarantor of the assignor, are released from any liability under the lease where the assignor has complied with their disclosure obligations under the Act.

#### 3.13.2 *Mediators and QCAT jurisdiction*

Clause 56 amends section 97 of the Act to remove the current limitation on mediators' jurisdiction to mediate retail tenancy disputes about rent arrears. A technical amendment limits the maximum monetary amount in dispute that may be mediated to align the monetary limit for mediation with that of QCAT<sup>102</sup>. The monetary limit is the same as the District Court of Queensland, which is \$750,000.<sup>103</sup>

#### 3.13.3 *Transitional provisions*

Clause 60 of the Bill contains transitional provisions to make clear which legislation applies to transactions that are underway at the time the amendments commence. For example, the Bill provides that if a specialist retail valuer was agreed to or nominated under section 28 of the Act before the amendments commence, the former unamended sections of the Act continue to apply.<sup>104</sup>

A transitional regulation-making power in proposed new section 153 is discussed in section 11, Fundamental Legislative Principles.

#### 3.13.4 *Removal of penalties*

The Bill removes a number of penalties. The department advised the committee that the reasons for removal of some existing offence provisions included that: they are not necessary; the aggrieved party would have recourse to the dispute resolution process under the Act in relation to the act or omission of the other party; or replacing the offence provision with an implied lease term provides a more direct and effective compliance incentive.

The department also advised:

*..that certain offence provisions in the Act are to be retained to underscore the importance of the provision. For example, the offence provisions with respect to unauthorised disclosure of tenant turnover information by a landlord of their agent, or unauthorised disclosure of lease or submission by an [specialist retail valuer].<sup>105</sup>*

<sup>102</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 7

<sup>103</sup> *District Court of Queensland Act 1967*, section 68

<sup>104</sup> Proposed section 145, inserted by clause 60

<sup>105</sup> Department of Justice and Attorney-General, correspondence dated 23 October 2015, p 7

## 4 Compliance with the Legislative Standards Act

### 4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (the LSA) states that ‘fundamental legislative principles’ are the “principles relating to legislation that underlie a parliamentary democracy based on the rule of law”. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the House.

#### 4.1.1 *Rights and liberties – clause 60*

Clause 60 of the Bill inserts new section 153. The new section provides for a transitional regulation which “may make provision of a saving or transitional nature for which it is necessary to make provision to allow or facilitate the change from the operation of the unamended Act to the operation of the amended Act.”<sup>106</sup> The regulation may have retrospective operation to a day not earlier than the commencement.<sup>107</sup>

Section 4(3)(g) of the LSA provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively. The committee considered that strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively. The committee also noted that the former Scrutiny of Legislation Committee had commented that if any retrospective regulation-making power was permitted it should be tightly constrained.<sup>108</sup>

The committee noted that the Bill allows transitional regulations to be made that can operate retrospectively. However, the committee considered the limits to the transitional regulation making power, namely that transitional regulations are only able to cover matters that are necessary to help transition to the new system and the regulation must cease to operate within one year after commencement.

In light of these constraints on the regulation making power, the committee considered the transitional regulation justified in the circumstances.

### 4.2 Explanatory Notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an explanatory note should contain.

The committee noted the explanatory notes were silent regarding the potential for retrospective transitional regulations in new section 153 to be made in potential breach of section 4(3)(g) of the LSA. The committee considered that the explanatory notes should have included discussion of this potential breach of the LSA.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 of the LSA and a reasonable level of background information and commentary to facilitate understanding of the Bill’s aims and origins.

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<sup>106</sup> Retail Shop Leases Amendment Bill 2015, cl 60

<sup>107</sup> Retail Shop Leases Amendment Bill 2015, cl 60

<sup>108</sup> *Alert Digest* 1996/3, p 9

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**Appendices-****Appendix A – List of Submissions**

<b>Sub No.</b>	<b>Submitter</b>
001	Assistant Professor Tammy Johnson, Bond University
002	Shopping Centre of Australia
003	Queensland Law Society
004	Leasing Information Services
005	Property Council of Australia
006	North Queensland Airports
007	Mr Don Gilbert