THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property.REgl818846

19 February 2014

Ms Candace Barron
Acting NSW Small Business Commissioner
Retail Leases Act Review
GPO Box 5477
Sydney NSW 2001

By email: retail.review@smallbusiness.nsw.gov.au

Dear Acting Commissioner

2013 Review of the *Retail Leases Act 1994 ("Act")*

The Law Society's Property Law Committee ("PL Committee") and Dispute Resolution Committee ("DR Committee") have reviewed the *2013 Review of the Retail Leases Act 1994 Discussion Paper* ("Discussion Paper").

The PL Committee is comprised of specialist property law practitioners, including practitioners who act for landlords and tenants, large and small. The DR Committee is comprised of members who are mediators and dispute resolution practitioners and experts and advises the Law Society Council on all matters relating to or associated with dispute resolution.

The Committees' responses to the questions raised in the Discussion Paper are set out in the attached table.

The Law Society is grateful that the Office of the NSW Small Business Commissioner included representatives from the PL Committee in the Working Group formed for the current review.

The PL Committee emphasises the importance of reasonable lead times between the circulation of any consultation draft Bill, finalisation of the Bill and the introduction of any Bill into Parliament. It is critical that the commencement date of any amending legislation allows all participants in the retail lease industry sufficient time to properly prepare for changes, including the updating of retail leasing precedents and documentation.

Any questions in respect of this letter should be directed to Gabrielle Lea, Policy Lawyer for the PL Committee on 9926 0375 or email: gabrielle.lea@lawsociety.com.au

Yours sincerely,

Ros Everett

Ros Everett
President

2013 Review of the *Retail Leases Act 1994*

Detailed submission of the Property Law Committee (referred to as "the Committee") including comments of the Dispute Resolution Committee (which are attributed to the "DR Committee"), Law Society of New South Wales

No	Question	Response
Information Asymmetry		
1.1.a	Is the confidentiality of the financial arrangements between the parties more important than the provision of industry information?	• Yes the confidentiality of the financial arrangements between the parties is more important than the provision of industry information. • As a general principle, the Committee supports parties transacting in the marketplace with full information. However the introduction of mandatory registration for all retail leases as a means of increasing availability of information in the industry is not supported by the Committee on the following grounds: ▪ Registration of a lease will not necessarily mean that the whole of the financial arrangements between the parties are available on the register. ▪ Registration of the lease only records the applicable rent at the commencement of the lease; rent changes during the term of the lease, such as a market review, are not captured. ▪ Mandating registration will increase the costs of the lease transaction. The real cost of registration is much more than the lodgement fee payable at Land and Property Information. Where the premises are mortgaged, costs associated with registration will include production of title costs, mortgagee consent fee and sometimes an additional Deed of Consent with terms to be negotiated. • The Committee does not support an alternate register for a summary sheet of all retail leases. This would seem to duplicate the provision of information in the Lessor's Disclosure Statement. • The Committee also notes that a system of notification of retail leases to the Small Business Commissioner in Victoria, under the former section 25 of the *Retail Leases Act 2003* (Vic) was abandoned in November 2012. The Committee understands that the notification system was abandoned on the basis that it imposed unnecessary costs and served no significant purpose.
1.1.b	If not, how best could the whole of the financial arrangements of the lease be made publically accessible?	Not applicable.
1.1.c	If information were required to be registered, how should updated side deals be dealt with?	The Committee does not support mandatory registration.

No	Question	Response
1.2.a	What, if anything, should be done about the collection of turnover data by landlords?	In the Committee's view, nothing needs to be done. Collection of the information assists management of shopping centres and enables landlords to assist tenants who are struggling.
Outgoings		
2.1.a	How can there be greater certainty in outgoings, including management fees that are recovered from tenants?	• The Committee regards the current level of outgoings disclosure as adequate. • Management fees should be able to be determined and disclosed.
2.1.b	How can the reporting obligations of a landlord who collects outgoings be streamlined in such a way that the tenant gets important information, yet unnecessary costs and any excessive reporting activities are removed?	The Committee agrees that it is difficult to strike the right balance and suggests the level of detail and disclosure should be referable to the size and nature of the building or centre in which the premises are located.
2.2.a	Are the current requirements for marketing plans, six monthly expenditure statements, advertising statements and auditor's reports appropriate and necessary (an opportunity to reduce red tape)?	The Committee is not aware of this being an issue but welcomes a review of requirements with a view to reducing red tape.
2.2.b	Is the current regulation for the use of advertising and promotion funds working well?	Yes although any streamlining to reduce red tape would be welcome.
2.3.a	Would there be a benefit or detriment if landlords are prohibited from recovering land tax from tenants?	In the Committee's view, prohibiting the recovery of land tax from tenants could potentially result in higher rents. The current approach which allows for the possibility of collecting land tax but limits the way in which this may be done is an appropriately balanced and flexible approach.
2.4.a	Is the disclosure regime working as intended? Please provide recommendations of how it can be improved.	• Generally the Committee regards the current disclosure regime as working reasonably well. However the Committee considers that the gradual increase in size of disclosure statements does add to the cost of the leasing transaction for all parties. • Constant review of the functioning of the disclosure statement and whether statements can be simplified or streamlined is recommended. The Committee would be pleased to participate in further review of the disclosure statements for both the landlord and tenant. • It is the experience of some members of the Committee that a tenant might delay in providing the Lessee's Disclosure Statement, seeking to lengthen the period for requesting amendments where the tenant does not need to pay associated lease preparation expenses under s 14(4)(c) of the *Retail Leases Act 1994* (NSW) ("Act"). The Committee suggests that the better timeframe to be inserted in s 14(4)(c) is "within seven (7) days of receipt of the lessor's disclosure statement", consistent with the

No	Question	Response
		timeframe within which the tenant is obliged to provide the Lessee's Disclosure Statement.
2.4.b	Should the Act provide a wider range of remedies if a landlord or tenant does not provide a Disclosure Statement as required?	• The remedies are generally appropriate for tenants where the landlord fails to provide a Disclosure Statement. • The Committee notes that although a tenant is required to provide a Lessee's Disclosure Statement, there is no remedy for a landlord if this is not provided by a tenant. This is particularly problematic where a tenant later seeks to rely on a representation but the matter was not raised in a Lessee's Disclosure Statement.
2.4.c	Should the minimum time for providing the Disclosure Statement of 7 days before the lease commences be reduced if both landlord and tenant are legally represented and request the option?	• The Committee supports this proposal as providing greater flexibility to the parties. • The mechanism by which this might be achieved could be modelled on the waiver of the cooling off period that applies in a contract for the sale of land, where a purchaser obtains a certificate signed by a solicitor that complies with s 66W of the *Conveyancing Act 1919*.
2.4.d	Where a lease requires a tenant to pay "strata levies" should any special levy, extra levy or sinking fund have to be specifically disclosed (these levies can be significant amounts such as for major capital works to the strata property)?	Special levy, extra levy or sinking fund payments should be specifically disclosed by a landlord to allow recovery. Although a landlord may not be aware at the time of entering a lease that a special levy will later be struck, in the Committee's view allowing recovery from a tenant without disclosure may place an unfair burden on the tenant. Special levy, extra levy or sinking fund payments are essentially payments of a capital nature which should be borne by a landlord.
2.5.a	What are the views of stakeholders on how best to manage the payment of an EUA levy under a retail lease?	Although a tenant may ultimately benefit from an environmental upgrade agreement it is difficult to ensure that the contribution from a particular tenant is fairly based on a reasonable estimate of cost savings. In the Committee's view it is important to remember that the upgrade improves the long term value of the asset for the landlord.
Fidelity of the Bargain		
3.1.a	As a sub-tenant, how can a franchisee be protected if a franchisor becomes insolvent or fails to meet its obligations under a retail lease?	• In the Committee's experience, franchisees are often licensees rather than sub-tenants. • The Committee notes that the Franchising Code of Conduct and Insolvency legislation are Commonwealth legislation; but retail lease legislation is State legislation. • In the Committee's view, any reform in this area should be considered by a review of the Franchising Code of Conduct as this issue applies more widely that just within a retail context. • Existing relief is available to a franchisee sub-tenant under s 130 of the *Conveyancing Act 1919*.

No	Question	Response
3.1.b	Is a registered sub-lease adequate protection in the case of the franchisor's liquidation or administration?	• Yes, given the operation of s 130 of the *Conveyancing Act 1919,* which gives relief against forfeiture. This provision essentially allows the subtenant, if it wishes, to step in and take over the rights and obligations under the head lease. • In the Committee's view franchisee sub-tenants should not be given special rights different from other sub-tenants.
3.1.c	In some circumstances, should a franchisee be permitted to continue a business under the retail lease, such as assuming the rights and responsibilities of the franchisor (as head tenant) under the retail lease?	• The Committee does not support a franchisee subtenant having an automatic right to assume the rights and responsibilities of the franchisor under a retail lease, upon the franchisor's liquidation or administration. The parties should be free to enter into a new lease if they wish to do so. • From the landlord's perspective, it is difficult to see why retail leases legislation should prescribe to landlords who should be a tenant. • From the franchisee subtenant's perspective, it may not wish to, or may not be able to continue the business without the business systems, branding and products previously supplied by the franchisor. The franchisee subtenant would certainly not want to take on an obligation to pay substantial rent arrears.
3.2.a	What is an appropriate remedy for a tenant in a retail shop located in a strata scheme where something under the control of the Owners' Corporation disturbs the retail business?	• The appropriate remedy is a right of action against the Owners Corporation. The Committee notes that under s 62 and s 138 of the *Strata Schemes Management Act 1996* an occupier (being an "interested person") has standing to bring an action against the Owners Corporation for failing to repair and maintain the common property. Ideally the landlord might bring the action first but it is important for a tenant to be able to bring the action in its own right in situations where a landlord might be slow or unwilling to act. • In the Committee's view, any reform in this area should be considered in the current review of the strata legislation. This issue is relevant to all leases in a strata scheme, not just retail leases.
3.2.b	What are the benefits or detriments of tenants in a strata development having remedies to address disturbances arising from actions by the Owners' Corporations heard by the ADT?	• An owners corporation may be unaware of the lease terms and the operation of a tenant's business. In the Committee's view it is unclear why an owners corporation should be involved in an issue regarding the tenant's quiet enjoyment. On the other hand it gives a tenant a direct mechanism to seek a remedy where the landlord is unable to provide a solution. • In the Committee's view, any reform in this area should be considered in the current review of the strata legislation. Again this issue is relevant to all leases in a strata scheme, not just retail leases.

No	Question	Response
3.3.a	What is the best way to ensure that tenants and landlords operate within the policy intent of the Act, namely to ensure fair and efficient dealings between the parties?	• The Committee notes the long title to the current Act. The best way to ensure fair and efficient dealings between the parties is to allow parties to enforce their rights under the Act and at law. No other change is required. • The Committee also notes the current sections in the Act dealing with misleading and unconscionable conduct are appropriate.
3.3.b	What would be the benefits or detriments if the Act contained an anti–avoidance clause?	• The Committee does not support the introduction of an anti-avoidance clause and questions whether there is any evidence that parties are entering into schemes to avoid the operation of the Act. • Anti-avoidance clauses are used in revenue legislation and are not appropriate for a dynamic retail industry.
3.3.c	What would be the benefits or detriments if the Act contained principles such as a requirement for the fidelity of the bargain to be upheld?	The Committee does not see the benefit of introducing such principles into the Act and prefers to rely on common law principles such as estoppel, unconscionable conduct, reasonableness, implied terms as developed by the Courts.
3.4.a	Are the remedies in the Act for the repair of damaged premises adequate?	Yes, in the Committee's experience.
3.5.a	Is there a market failure in relation to a tenant's ability to negotiate a new lease at the end of a term?	In the Committee's view this is not a matter of market failure but more likely market forces at work. If the market is favouring landlords, a particular landlord may not want to negotiate with an existing tenant and might seek to find a better tenant. Conversely if the market is favouring tenants, a particular tenant may seek to negotiate a more advantageous lease elsewhere.
3.5.b	Would there be a benefit or detriment if sitting tenants had a right of first or last refusal for a new lease upon the expiration of the initial term of lease?	• In the Committee's view both these proposals would be detrimental if adopted. A landlord of a shopping centre or cluster of shops needs to be able to have a range of tenants as it sees fit. • A right of last refusal would be particularly problematic for both tenants and landlords by its nature. It also seems particularly unfair to the alternative tenant who might engage in negotiations across several months, only to be ousted once negotiations have been completed.
3.5.c	Would there be a benefit or detriment if sitting tenants had a right for the period of 'holding over' to be a rolling six month lease that began when a negotiation finally failed?	• In the Committee's view this proposal would be detrimental if adopted. A landlord of a shopping centre or cluster of shops needs to be able to have a range of tenants as it sees fit. • In the Committee's view the current regime strikes the right balance between a tenant's security of tenure and a landlord's ability to choose its tenant mix.

No	Question	Response
Streamlining / Simplification		
4.1.a	Would there be a benefit or detriment to the leasing industry if a standard lease was introduced that is clear, concise and easily understandable?	• The Law Society provides a precedent Law Society lease which is already widely used, primarily for simple leases or leases drafted by non-specialist leasing lawyers who do not have their own precedent lease. • The Law Society has supplied figures in relation to sales volumes of the precedent lease on a commercial-in-confidence basis. • A prescribed standard lease will not benefit the leasing industry. Shopping centre leases in particular are drafted for the needs of the centre. If a standard lease were prescribed that lease would most likely be substantially amended to allow for the requirements of a centre causing more complexity for tenants. In the Committee's view, the best approach is an optional standard lease, such as the precedent Law Society lease.
4.1.b	What would be the most effective way of developing a standard retail lease for NSW retail leases?	See the response to question 4.1a.
4.2.a	Is it appropriate for the Registrar of Retail Tenancy Disputes to appoint specialist retail valuers rather than the Administrative Decisions Tribunal?	The Committee supports this proposal if it reduces red tape and costs.
4.2.b	Should the definition of 'specialist retail valuer' be expanded to include specialist retail valuers with some experience that also meet an approved accreditation standard?	The Committee supports this proposal and suggests that it will improve industry confidence in the system.
4.3.a	Should the time required for registration of a lease by the landlord be expanded from one month to three?	• The Committee supports increasing the time for registration from one month to three months. • Additionally there should be a mechanism that allows for a further extension where delays are beyond the control of a diligent landlord, such as a mortgagee who unreasonably delays giving mortgagee consent.
4.3.b	Should there be more a more effective remedy where the landlord does not register the lease or provide the tenant with a signed copy of the lease within the timeframe required by the Act?	• The simplest and most cost effective remedy where the landlord does not register the lease is for the tenant to lodge a caveat to protect its interest as tenant. • The Committee understands that there is concern in the industry about the inclusion of retail lease provisions which seek to prohibit the tenant from lodging a caveat and expressly stating that such lodgement will constitute a breach of the lease. The Committee advocates that such clauses prohibiting a tenant's caveat should be void under the amended Act, provided the caveat is limited to protecting the tenant's interest. Whatever inconvenience a landlord might suffer is minor

No	Question	Response
		compared to the importance to the tenant of an effective means of protecting its interest. • The Committee also notes that where the term of a lease (including any option term) does not exceed three years, the tenant's interest is protected by s 42(1)(d) of the *Real Property Act 1900*, a recognised exception to the principle of indefeasibility.
4.4.a	Are the current Disclosure Statements working effectively?	See the response to question 2.4a.
4.4.b	If not, how should they be streamlined to remove unnecessary compliance burdens on parties.	See the response to question 2.4a.
4.4.c	Would it be beneficial for a working group to be convened to examine ways to streamline disclosure requirements and reduce red tape?	Yes and the Committee would welcome the opportunity to participate in such a working group.
4.5.a	Should the Act clarify whether or not mortgagee consent fees can be passed on to a tenant?	Yes. The Committee does not support the passing on of mortgagee consent fees to the tenant. The Committee also suggests consideration could be given to prescribing the fee a mortgagee can charge the landlord for giving consent.
Fair Dealings		
5.1.a	Would a duty to act in good faith result in fairer and more efficient leases and reduce the number of disputes or have the opposite effect?	The Committee does not support introducing a duty to act in good faith into the Act. Existing provisions adequately deal with misleading and unconscionable conduct. The DR Committee, however, does support introducing a duty to act in good faith which it considers would assist in dispute resolution because it would be a ground upon which the parties could attempt resolution. The DR Committee notes that the bar to satisfy the requirements of unconscionable conduct is high. The concept of good faith is a more workable benchmark. It seems reasonable as submitted in the Discussion Paper that the duty of good faith could be contracted out by agreement between both parties. On this basis, it is reasonable that if both parties can agree to act in good faith then this should apply. From a cost perspective, it is difficult for an individual tenant to take proceedings against a large shopping centre landlord. For this reason, dispute resolution has a very important part to play in retail lease disputes and to date it must be acknowledged that it has been a most successful avenue for dispute resolutions. Statistics from the NSW Office of Small Business indicate a success rate of over 90% of resolution of matters at mediation or shortly thereafter. This is an exemplary statistic. The DR Committee submits that a duty to act in good faith would only assist this process.

No	Question	Response
5.2.a	Should the Act deal with the draw down of a bank guarantee?	No, this is a matter between the landlord and the issuing bank.
5.2.b	Should there be a timeframe after the end of a lease when the landlord must release the bank guarantee?	No, the bank guarantee should be returned once the tenant has complied with its obligations under the lease.
Coverage of the Act		
6.1.a	Are retail shops that are currently not covered under the Act which should be?	The Committee is not aware of any particular type of shop which should be added to Schedule 1.
6.1.b	Are retail shops that are currently covered under the Act which should not be?	Ambiguities should be removed such as vending machines, video games and automatic teller machines.
6.1.c	What is the benefit or detriment in covering a limited range of other commercial premises under the Act?	Commercial premises should be excluded from the operation of the Act. Commercial leases are different to retail leases.
6.1.d	Which is the best approach to specify which businesses or premises are covered under the Act?	The Committee supports the current approach of a Scheduled list. The Committee considered that it may be appropriate for the Schedule to be in a Retail Leases Regulation.
6.1.e	Should the Act clarify that only leases that are "retail shop leases" on commencement of the lease are covered by the Act?	Yes this would be a useful clarification, particularly if changes are made as to what constitutes a "retail shop lease" as a result of the current review.
6.2.a	What are the benefits and detriments of including retail shops located in an office tower under the Act?	The operation of s 5(d) of the Act does seem to create some anomalies. It seems to the Committee that the distinction between shopping centres in an office tower and shopping centres generally is confusing. The intent of the section should be further examined and then clarified as necessary.
6.2.b	Should the Act clarify that certain businesses within shopping centres should be excluded under the Act, such as ATMs and vending machines?	Yes this would reduce the unnecessary complexity that currently applies.
6.3.a	Should publicly listed companies and their subsidiaries be excluded from the operation of the Act?	Yes, where a publicly listed company or its subsidiary is a tenant. By their nature these companies require less protection.
6.3.b	What are the benefits and detriments of excluding publicly listed companies and their subsidiaries from the Act; in relation to these companies, other retailers and landlords?	• The Act should protect unsophisticated tenants. Publicly listed companies (and private national retail chains) are sophisticated and do not need protection. • Some requirements of the Act do not necessarily fit within the business models of these companies; compliance with these requirements is an unnecessary regulatory burden.
Reduce Prescriptive Regulation		
7.1.a	Is the minimum term of 5 years for a	No, the length of tenure should be driven by the

No	Question	Response
	lease still required to provide security of tenure to tenants?	market.
7.1.b	Is the requirement for a tenant to obtain a certificate from a lawyer or conveyancer for a lease for less than five years still necessary?	• The Committee strongly supports a mechanism to ensure both parties to the lease are properly advised of their rights and obligations. In the Committee's view, ensuring parties are better informed at the point of entering the lease reduces the likelihood of disputes occurring during the term of the lease. • The Committee would be pleased to work with the Commissioner in educating the community and promoting the benefits of obtaining legal advice before entering into a lease. • The Committee would also be pleased to work with the Commissioner in educating practitioners in relation to any amendments made to the Act as a result of the current review.
7.1.c	Should short term leases of less than 6 months (including pop-up shops) be subject to the provisions of the Act, or subject to limited application of the Act?	Short term leases should not be subject to the terms of the Act.
7.2.a	Are the provisions of the Act relating to assignment appropriate, and if not how should they be changed?	The Committee suggests consideration should be given to inserting the following new provisions in the amended Act: • A provision where if a tenant is in breach of the lease, then the breach must be remedied or the landlord should have a right to have the breach remedied prior to consenting to an assignment. This would benefit not only the landlord but also the incoming tenant. • A provision entitling a landlord to require that the tenant, now the proposed assignor, supply updated information as to its financial position and retailing skills. This will allow a landlord to compare the assignor's current financial position with the assignee's financial position.
7.2.b	Should the assignor be liable to the landlord for a certain period of time after the assignment if the assignee breaches the terms of the lease?	• This is a difficult issue, given the competing perspectives of the landlord and assignor. • Clearly from a landlord's perspective it is better protected if the assignor is liable to the landlord for a certain period of time after the assignment of the lease. The question then becomes what is the appropriate period of time. • From the assignor's perspective, it will be looking to sever the relationship with the landlord and would not wish to take on this ongoing responsibility where it has no control over whether the assignee will comply with the obligations under the lease.
7.2.c	Does the Act need to clarify whether section 39 (1) (a) "use" refers to a	In the Committee's view this clarification is not required; "use" is qualified by the words "to which the

No	Question	Response
	category of use or the specific details listed for the original tenant?	shop is put".
7.3.a	Should the provision of the Act prohibiting termination for inadequate sales be amended or removed?	Yes, the prohibition should be removed. In the Committee's view markets have changed and the Act should allow for flexibility in relation to this point. In the Committee's experience some tenants want to be able to terminate the lease if they cannot achieve anticipated levels of sales.
Technical Issues		
8.1.a	How can the government ensure that the Act continues to meet its policy objectives and respond appropriately to changes in the retail leasing industry?	Regular and genuine consultation with landlords and tenants is necessary to achieve this purpose.
8.1.b	Should there be a provision for the Act to be reviewed on a regular schedule or allow any review to be conducted at the discretion of the Minister and Cabinet?	• The best position is a regular schedule of review with prior consultation. Ad hoc review of the Act creates much business uncertainty. While the Committee obviously recognises that the Government is entitled to review legislation, it is best done systematically. • Arguably the current review had its genesis in early 2008 (with the issue of a Discussion Paper) with long periods of Government inactivity following. The history of review of the Act since the last major amendments commenced in 2006 has in itself created much business uncertainty. The Committee suggests that all participants in the retail lease industry would benefit from a clear indication of a future review timetable.
8.2.a	Should the monetary limit for retail leases disputes in the ADT be increased? If so, what should the monetary limit be?	The Committee regards the current jurisdictional monetary limit of $400,000 for retail lease disputes at NCAT as appropriate. The DR Committee however, notes that the fit-out costs for a specialty shop may be in the vicinity of $250,000 and the payments for rent and outgoings over the term of the lease could approach $1,000,000. The DR Committee therefore considers that the jurisdiction limit of $400,000 is inadequate and should be raised to $750,000.

No	Question	Response
8.2.b	Are changes required to the provisions governing the ADT to ensure it has the appropriate capacity and resources to effectively deal with retail lease disputes?	In the Committee's view: • Given NCAT's jurisdiction commenced 1 January 2014 it is too early to comment on whether NCAT has the appropriate capacity and resources to effectively deal with retail lease disputes. • In the Committee's view it should be clear that where a matter is to be dealt with in the Supreme Court, NCAT has no jurisdiction. In the DR Committee's view, the current provisions which would apply with NCAT are appropriate. Retail lease disputes should be determined by NCAT wherever possible. Overcoming the limitation of the jurisdiction limit would assist this process.
8.3.a	How best can the provisions of the Act be enforced?	The Committee considers: • Enforcement first requires knowledge of the relevant rights and obligations. The Committee encourages a continued focus on education of parties newly entering into leases, with publication of resources such as the Small Business Commissioner's Info Kit for Retail Tenants. • Constant review of the ability of affected parties to access the mechanisms by which they can seek to enforce their rights is also necessary. In the Committee's view it would be appropriate for the Small Business Commissioner to conduct a review in due course of the functioning of NCAT's Consumer and Commercial Division in dealing with claims made under the Act. • Some members of the Committee suggest that the Act should contain the dollar value of penalties rather than penalty points making the consequence of non-compliance clearer. In the DR Committee's view, the provisions of the Act can be enforced by continuing to expand natural consequences for breach.
8.3.b	Would providing natural consequences when a breach occurs be an effective remedy and also promote better behaviour between parties and therefore outcomes in retail leasing?	Committee members agree with the example given in the Discussion Paper, where the tenant may terminate the lease for the landlord's non-compliance with disclosure requirements, as an illustration of a remedy that might not be effective. In these particular circumstances, the tenant might be better served by a remedy entitling it to a rent reduction until such time as the landlord complies with its obligations. This would certainly be a very strong incentive for landlords to comply promptly. In the DR Committee's view, providing natural consequences when a breach occurs can be an effective remedy and also promote better behaviour between parties and therefore outcomes in retail leasing. One also needs to consider the cost of litigation. If there is an automatic remedy this is of significant benefit to the parties.
8.3.c	What remedies or penalties in the Act	Although most of the penalty provisions are not

No	Question	Response
	should be changed?	enforced, in the Committee's view it is useful to retain them as a deterrent. In the DR Committee's view, some of the monetary penalties should be increased to constitute a more effective deterrent.
8.4.a	Should the Act be amended to deal with revenue from online sales?	In the Committee's view this is unnecessary, it is a matter for the parties to the lease to consider in particular circumstances.
8.4.b	Should the Act give clarity on the calculation of turnover data from online sales?	The Committee does not believe this is necessary.

No	Question	Response
Streamlining / Simplification		
4.1.a	Would there be a benefit or detriment to the leasing industry if a standard lease was introduced that is clear, concise and easily understandable?	• The Law Society provides a precedent Law Society lease which is already widely used, primarily for simple leases or leases drafted by non-specialist leasing lawyers who do not have their own precedent lease. • The Law Society has supplied figures in relation to sales volumes of the precedent lease on a commercial-in-confidence basis. • A prescribed standard lease will not benefit the leasing industry. Shopping centre leases in particular are drafted for the needs of the centre. If a standard lease were prescribed that lease would most likely be substantially amended to allow for the requirements of a centre causing more complexity for tenants. In the Committee's view, the best approach is an optional standard lease, such as the precedent Law Society lease.
4.1.b	What would be the most effective way of developing a standard retail lease for NSW retail leases?	See the response to question 4.1a.
4.2.a	Is it appropriate for the Registrar of Retail Tenancy Disputes to appoint specialist retail valuers rather than the Administrative Decisions Tribunal?	The Committee supports this proposal if it reduces red tape and costs.
4.2.b	Should the definition of 'specialist retail valuer' be expanded to include specialist retail valuers with some experience that also meet an approved accreditation standard?	The Committee supports this proposal and suggests that it will improve industry confidence in the system.
4.3.a	Should the time required for registration of a lease by the landlord be expanded from one month to three?	• The Committee supports increasing the time for registration from one month to three months. • Additionally there should be a mechanism that allows for a further extension where delays are

No	Question	Response
		beyond the control of a diligent landlord, such as a mortgagee who unreasonably delays giving mortgagee consent.
4.3.b	Should there be more a more effective remedy where the landlord does not register the lease or provide the tenant with a signed copy of the lease within the timeframe required by the Act?	• The simplest and most cost effective remedy where the landlord does not register the lease is for the tenant to lodge a caveat to protect its interest as tenant. • The Committee understands that there is concern in the industry about the inclusion of retail lease provisions which seek to prohibit the tenant from lodging a caveat and expressly stating that such lodgement will constitute a breach of the lease. The Committee advocates that such clauses prohibiting a tenant's caveat should be void under the amended Act, provided the caveat is limited to protecting the tenant's interest. Whatever inconvenience a landlord might suffer is minor compared to the importance to the tenant of an effective means of protecting its interest. • The Committee also notes that where the term of a lease (including any option term) does not exceed three years, the tenant's interest is protected by s 42(1)(d) of the *Real Property Act 1900*, a recognised exception to the principle of indefeasibility.
4.4.a	Are the current Disclosure Statements working effectively?	See the response to question 2.4a.
4.4.b	If not, how should they be streamlined to remove unnecessary compliance burdens on parties.	See the response to question 2.4a.
4.4.c	Would it be beneficial for a working group to be convened to examine ways to streamline disclosure requirements and reduce red tape?	Yes and the Committee would welcome the opportunity to participate in such a working group.
4.5.a	Should the Act clarify whether or not mortgagee consent fees can be passed on to a tenant?	Yes. The Committee does not support the passing on of mortgagee consent fees to the tenant. The Committee also suggests consideration could be given to prescribing the fee a mortgagee can charge the landlord for giving consent.
Fair Dealings		
5.1.a	Would a duty to act in good faith result in fairer and more efficient leases and reduce the number of disputes or have the opposite effect?	The Committee does not support introducing a duty to act in good faith into the Act. Existing provisions adequately deal with misleading and unconscionable conduct. The DR Committee however, does support introducing a duty to act in good faith which it considers would assist in dispute resolution because it would be a ground upon which the parties could attempt resolution. The DR Committee notes that the bar to satisfy the

No	Question	Response
		requirements of unconscionable conduct is high. The concept of good faith is a more workable benchmark. It seems reasonable as submitted in the Discussion Paper that the duty of good faith could be contracted out by agreement between both parties. On this basis it is most reasonable then that if both parties can agree to act in good faith that this should apply. From a cost perspective, it is difficult for an individual tenant to take proceedings against a large shopping centre landlord. For this reason dispute resolution has a very important part to play in retail lease disputes and to date it must be acknowledged that it has been a most successful avenue for dispute resolutions. Statistics from the NSW Office of Small Business indicate a success rate of over 90% of resolution of matters at mediation or shortly thereafter. This is an exemplary statistic. The DR Committee submits that a duty to act in good faith would only assist this process.
5.2.a	Should the Act deal with the draw down of a bank guarantee?	No, this is a matter between the landlord and the issuing bank.
5.2.b	Should there be a timeframe after the end of a lease when the landlord must release the bank guarantee?	No, the bank guarantee should be returned once the tenant has complied with its obligations under the lease.
Coverage of the Act		
6.1.a	Are retail shops that are currently not covered under the Act which should be?	The Committee is not aware of any particular type of shop which should be added to Schedule 1.
6.1.b	Are retail shops that are currently covered under the Act which should not be?	Ambiguities should be removed such as vending machines, video games and automatic teller machines.
6.1.c	What is the benefit or detriment in covering a limited range of other commercial premises under the Act?	Commercial premises should be excluded from the operation of the Act. Commercial leases are different to retail leases.
6.1.d	Which is the best approach to specify which businesses or premises are covered under the Act?	The Committee supports the current approach of a Scheduled list. The Committee considered that it may be appropriate for the Schedule to be in a Retail Leases Regulation.
6.1.e	Should the Act clarify that only leases that are "retail shop leases" on commencement of the lease are covered by the Act?	Yes this would be a useful clarification, particularly if changes are made as to what constitutes a "retail shop lease" as a result of the current review.
6.2.a	What are the benefits and detriments of including retail shops located in an office tower under the Act?	The operation of s 5(d) of the Act does seem to create some anomalies. It seems to the Committee that the distinction between shopping centres in an office tower and shopping centres generally is confusing. The intent of the section should be further examined and then clarified as necessary.

No	Question	Response
6.2.b	Should the Act clarify that certain businesses within shopping centres should be excluded under the Act, such as ATMs and vending machines?	Yes this would reduce the unnecessary complexity that currently applies.
6.3.a	Should publicly listed companies and their subsidiaries be excluded from the operation of the Act?	Yes, where a publicly listed company or its subsidiary is a tenant. By their nature these companies require less protection.
6.3.b	What are the benefits and detriments of excluding publicly listed companies and their subsidiaries from the Act; in relation to these companies, other retailers and landlords?	• The Act should protect unsophisticated tenants. Publicly listed companies (and private national retail chains) are sophisticated and do not need protection. • Some requirements of the Act do not necessarily fit within the business models of these companies; compliance with these requirements is an unnecessary regulatory burden.
Reduce Prescriptive Regulation		
7.1.a	Is the minimum term of 5 years for a lease still required to provide security of tenure to tenants?	No, the length of tenure should be driven by the market.
7.1.b	Is the requirement for a tenant to obtain a certificate from a lawyer or conveyancer for a lease for less than five years still necessary?	• The Committee strongly supports a mechanism to ensure both parties to the lease are properly advised of their rights and obligations. In the Committee's view, ensuring parties are better informed at the point of entering the lease reduces the likelihood of disputes occurring during the term of the lease. • The Committee would be pleased to work with the Commissioner in educating the community and promoting the benefits of obtaining legal advice before entering into a lease. • The Committee would also be pleased to work with the Commissioner in educating practitioners in relation to any amendments made to the Act as a result of the current review.
7.1.c	Should short term leases of less than 6 months (including pop-up shops) be subject to the provisions of the Act, or subject to limited application of the Act?	Short term leases should not be subject to the terms of the Act.

No	Question	Response
7.2.a	Are the provisions of the Act relating to assignment appropriate, and if not how should they be changed?	The Committee suggests consideration should be given to inserting the following new provisions in the amended Act: • A provision where if a tenant is in breach of the lease, then the breach must be remedied or the landlord should have a right to have the breach remedied prior to consenting to an assignment. This would benefit not only the landlord but also the incoming tenant. • A provision entitling a landlord to require that the tenant, now the proposed assignor, supply updated information as to its financial position and retailing skills. This will allow a landlord to compare the assignor's current financial position with the assignee's financial position.
7.2.b	Should the assignor be liable to the landlord for a certain period of time after the assignment if the assignee breaches the terms of the lease?	• This is a difficult issue, given the competing perspectives of the landlord and assignor. • Clearly from a landlord's perspective it is better protected if the assignor is liable to the landlord for a certain period of time after the assignment of the lease. The question then becomes what is the appropriate period of time. • From the assignor's perspective, it will be looking to sever the relationship with the landlord and would not wish to take on this ongoing responsibility where it has no control over whether the assignee will comply with the obligations under the lease.
7.2.c	Does the Act need to clarify whether section 39 (1) (a) "use" refers to a category of use or the specific details listed for the original tenant?	In the Committee's view this clarification is not required; "use" is qualified by the words "to which the shop is put".
7.3.a	Should the provision of the Act prohibiting termination for inadequate sales be amended or removed?	Yes, the prohibition should be removed. In the Committee's view markets have changed and the Act should allow for flexibility in relation to this point. In the Committee's experience some tenants want to be able to terminate the lease if they cannot achieve anticipated levels of sales.
Technical Issues		
8.1.a	How can the government ensure that the Act continues to meet its policy objectives and respond appropriately to changes in the retail leasing industry?	Regular and genuine consultation with landlords and tenants is necessary to achieve this purpose.

No	Question	Response
8.1.b	Should there be a provision for the Act to be reviewed on a regular schedule or allow any review to be conducted at the discretion of the Minister and Cabinet?	• The best position is a regular schedule or review with prior consultation. Ad hoc review of the Act creates much business uncertainty. While the Committee obviously recognises that the Government is entitled to review legislation, it is best done systematically. • Arguably the current review had its genesis in early 2008 (with the issue of a Discussion Paper) with long periods of Government inactivity following. The history of review of the Act since the last major amendments commenced in 2006 has in itself created much business uncertainty. The Committee suggests that all participants in the retail lease industry would benefit from a clear indication of a future review timetable.
8.2.a	Should the monetary limit for retail leases disputes in the ADT be increased? If so, what should the monetary limit be?	The Committee regards the current jurisdictional monetary limit of $400,000 for retail lease disputes at NCAT as appropriate. The DR Committee however, notes that the fit-out costs for a specialty shop may be in the vicinity of $250,000 and the payments for rent and outgoings over the term of the lease could approach $1,000,000. The DR Committee therefore considers that the jurisdiction limit of $400,000 is inadequate. The jurisdiction limit should be raised to $750,000.
8.2.b	Are changes required to the provisions governing the ADT to ensure it has the appropriate capacity and resources to effectively deal with retail lease disputes?	In the Committee's view: • Given NCAT's jurisdiction commenced 1 January 2014 it is too early to comment on whether NCAT has the appropriate capacity and resources to effectively deal with retail lease disputes. • In the Committee's view it should be clear that where a matter is to be dealt with in the Supreme Court, NCAT has no jurisdiction. In the DR Committee's view, the current provisions which would apply with NCAT are appropriate. Retail lease disputes should be determined by NCAT wherever possible. Overcoming the limitation of the jurisdiction limit would assist this process.
8.3.a	How best can the provisions of the Act be enforced?	The Committee considers: • Enforcement first requires knowledge of the relevant rights and obligations. The Committee encourages a continued focus on education of parties newly entering into leases, with publication of resources such as the Small Business Commissioner's Info Kit for Retail Tenants. • Constant review of the ability of affected parties to access the mechanisms by which they can seek to enforce their rights is also necessary. In the Committee's view it would be appropriate for the Small Business Commissioner to conduct a review in due course of the functioning of NCAT's Consumer and Commercial Division in dealing with claims made under the Act. • Some members of the Committee suggest that the

No	Question	Response
		Act should contain the dollar value of penalties rather than penalty points making the consequence of non-compliance clearer. In the DR Committee's view, the provisions of the Act can be enforced by continuing to expand natural consequences for breach.
8.3.b	Would providing natural consequences when a breach occurs be an effective remedy and also promote better behaviour between parties and therefore outcomes in retail leasing?	Committee members agree with the example given in the Discussion Paper, where the tenant may terminate the lease for the landlord's non-compliance with disclosure requirements, as an illustration of a remedy that might not be effective. In these particular circumstances, the tenant might be better served by a remedy entitling it to a rent reduction until such time as the landlord complies with its obligations. This would certainly be a very strong incentive for landlords to comply promptly. In the DR Committee's view, providing natural consequences when a breach occurs can be an effective remedy and also promote better behaviour between parties and therefore outcomes in retail leasing. One also needs to consider the cost of litigation. If there is an automatic remedy this is of significant benefit to the parties.
8.3.c	What remedies or penalties in the Act should be changed?	Although most of the penalty provisions are not enforced, in the Committee's view it is useful to retain them as a deterrent. In the DR Committee's view, some of the monetary penalties should be increased to constitute a more effective deterrent.
8.4.a	Should the Act be amended to deal with revenue from online sales?	In the Committee's view this is unnecessary, it is a matter for the parties to the lease to consider in particular circumstances.
8.4.b	Should the Act give clarity on the calculation of turnover data from online sales?	The Committee does not believe this is necessary.