



Review of the *Retail Leases Act 1994*

July 2023

Contents

Message from the Small Business Commissioner	3
Terms of reference	4
Summary of recommendations	5
About the Commission	9
Part I – Introduction	10
Part II – Overall feedback on the Act	12
Part III – The Act and its objectives	15
Part IV – Defining retail shop businesses	20
Part V – Entering a lease	27
Part VI – Safeguards of the Act	40
Part VII – Dispute resolution	53
Part VIII – Legislative context	55
Part IX – Next steps	57
Appendix A – Summary of survey results	61
Appendix B – State and Territory Retail Tenancy Legislation (Objects)	70
Links directory	72



Message from the Small Business Commissioner

A review of the *Retail Leases Act 1994 (NSW)* (the Act) was commissioned by the Minister for Small Business on 14 November 2022.

Retail leasing occurs in a variety of formats from large shopping centres to small strip malls, across metro and regional locations. Small, medium and large businesses participate as both lessees and lessors.

The policy intent of NSW's retail leasing legislation is distinguished from other states and territories. In NSW, retail leasing is defined by the type of business activity and the square meterage of the premises, specifically 1,000 square metres or less. Apart from these specifications, a retail lease is not defined, nor does it exclude businesses according to the scale or size of the business or enterprise.

The Act's primary policy objective is to foster good leasing practices between lessors, lessees and their advisors. The Act encourages negotiation between lessors and lessees and does not exclusively provide prescriptive protections. The Review has focussed on including the diverse range of actors that participate in retail leasing.

Lessors, lessees and their representatives had opportunities to contribute to this Review, including through:

- A consultation survey hosted on the NSW Government's 'Have Your Say' website and advertised on the Commission's website.
- Social media and electronic direct mail to identified stakeholders and small businesses.
- A broad public consultation process.

The Commission exercised strict independence and neutrality in this Review, in addition to ensuring the NSW Government's Better Regulation Principles were upheld. The discussion and recommendations in this Review attempt to balance the feedback, experiences, and needs of lessors and lessees.

The Review has also been informed by insights and experiences drawn from the Commission's involvement in providing impartial assistance and mediation services to the retail leasing industry over the last 10 years.

The best practice regulation model outlined in the NSW Government's Better Regulation Principles requires periodic reviews of all regulation, and reform, if necessary, to ensure the policy objectives remain appropriate and the terms are still the most effective way of achieving the objectives.

A review of the Act is justified given the significant changes that have occurred in retail, property sector, technology, and the economy in recent years. The rise and fall of various retail formats along with new technologies and consumer trends will continue to influence and modify retail operating models.

It is vital that the regulatory framework continues to strike a balance between the interests of all parties. This Review makes 32 recommendations aimed at improving outcomes and ensuring the Act remains effective and efficient in prescribing minimal standards to foster good leasing practices.

I thank all stakeholders who contributed to this Review.

Chris Lamont

NSW Small Business Commissioner

Terms of reference

The review is to consider any matter or aspect of the *Retail Leases Act 1994 (NSW)* (the Act) that relates to the review's objectives. This may include, but is not limited to:

- Opportunities to improve outcomes by:
 - Reducing red tape and compliance costs for retail tenants and landlords, while leaving appropriate matters to commercial negotiation or education rather than a reliance on legislative interpretation.
 - Ensuring the Act is efficient and effective at meeting policy objectives, and to assess whether original policy objectives remain appropriate.
 - Enhancing operational efficiency and legal certainty for stakeholders operating across jurisdictions.
 - Clarifying and simplifying the Act to eliminate ambiguity and provide greater clarity on obligations and requirements.
 - Reviewing the definition of 'retail' and the scope of the jurisdiction.
 - Aligning of key definitions and common terms and provisions to assist in simplifying standard retail lease agreements.
 - Reviewing and considering disclosure requirements and lease registration requirements and timeframes.
 - Identification of measures to promote the adoption of energy efficiency upgrades in retail and general commercial leases, noting capital costs and consumption charges over the life of a lease.
 - Assessing the suitability of existing requirements such as those relating to outgoings, the appointment of specialist retail valuers, land tax recovery limits, and the administration and operation of bond payment and recovery processes.
 - Bond processing and recovery arrangements.
- The interaction of the Act with other legislation such as the *Conveyancing Act 1919* (and regulations) and the *Strata Schemes Management Act 2015* (and regulations) and any amendments that may contribute to the efficiency, certainty, and clarity of commercial leasing transactions.
- The availability and accuracy of market information and consider measures that would improve transparency and availability of information.
- Other measures and concepts that may reduce potential disputes between landlords or tenants or allow for a better understanding of rights and obligations under the Act or under future lease agreements.

The review may make findings and recommendations to the NSW Government to improve the efficiency and effectiveness of the Act for all stakeholders.

The review will not consider:

- Valuation or commercial sums aligned with market rent settings.
- Operation of Retail and Other Commercial Leases (COVID-19) Regulation applied during the COVID-19 pandemic.
- Operation of NSW Civil and Administrative Tribunal.
- Business and property insurance markets.
- Operational aspects related to the delivery of mediation services by the Registrar of the Act.

Summary of recommendations

Part III The Act and its objectives	
Recommendation 1: Include an 'Objects Provision' within the Act.	Legislative amendment (further consultation)
Part IV Defining retail shop businesses	
Recommendation 2: Continue to define retail by the definitions in the Act and the Prescribed List in Schedule 1 of the Regulation and monitor for emerging issues.	Monitor and assess
Recommendation 3: Monitor for any disputes for hybrid businesses in relation to the jurisdiction of the Act to determine whether legislative amendment to define 'predominant use' is warranted.	Monitor and assess
Recommendation 4: Assess and review the Prescribed List in Schedule 1 every three years to capture emerging types of retail.	Monitor and assess
Recommendation 5: Relocate Schedule 1A to the Regulation to streamline legislative arrangements.	Legislative amendment
Recommendation 6: Amend section 5(d) to clarify an exception for ancillary rights excluded by Schedule 1A where the spaces (such as car parking, signage or storage) are conferred or used in conjunction with operating the primary business of the retail lease.	Legislative amendment
Recommendation 7: Consideration be given to opportunities to improve outcomes for small motels experiencing poor commercial arrangements due to ratchet clauses. This could include consideration of regulatory options within the <i>Conveyancing Act 1919</i> or the <i>Real Property Act 1900</i> for new leases (for example compulsory mediation provisions in leases), and broader issue options outside the Act to support improved outcomes for historic leases.	Non-legislative
Part V Entering a lease	
Recommendation 8: Undertake further policy development, consultation and codesign to refine and develop key features of a standard lease under the Optional Simplified Standard Lease model.	Non-legislative
Recommendation 9: Maintain the 7-day timeframe for providing the lessor's disclosure statement as per section 11 of the Act and amend to add a provision providing an option of a waiver where the lessor and lessee have each engaged a legal practitioner.	Legislative amendment
Recommendation 10: Adapt the disclosure model to provide tailored disclosure statements for non-shopping centre retail premises, shopping centre retail premises, and sub leases under a Crown lease or a head lease. This can be affected by legislative amendment to move Schedule 2 to the Regulation and the consideration of a regulation making power to allow for streamlined review.	Legislative amendment

Recommendation 11: Develop and maintain a short and informative 'before you lease' factsheet to be prescribed under section 9(1)(b)(ii) with relevant links to seek further information in the current Retail Tenancy Guide.	Legislative amendment
Recommendation 12: Amend section 16(2)(a) to provide the lessee an extension for delays arising from the requirement to provide proof of insurance, bank guarantees, and other relevant documents pertaining to the lease.	Legislative amendment
Recommendation 13: Initiate a feasibility study on the development of a digital platform to support lease negotiations and ongoing management of a retail lease. This feasibility study should align with relevant NSW Government requirements, such as the NSW Government 'Design Standards' for effective design and delivery practices for customer-focussed services.	Non-legislative

Part VI Safeguards of the Act

Recommendation 14: Amend section 44A(1)(b) to clarify that if a lessor provides written notice to a lessee, a lessor can advertise the availability of a shop for lease while also inviting the existing lessee to make an offer or express their interest. Maintain restrictions for existing occupancy arrangements.	Legislative amendment
Recommendation 15: Amend the definition of 'lease preparation expenses' under section 3 of the Act to exclude Electronic Lodgement Network Operator costs.	Legislative amendment
Recommendation 16: Consider a preliminary process change to require lessors and/or agents to register in Retail Bonds Online (RBO) to access lodgement forms. Based on the uptake of RBO lodgement, there may be the option to reduce the timeframe for bond lodgement in the future.	Non-legislative
Recommendation 17: Amend section 28(1)(b1) to address stakeholder concerns regarding lack of transparency in outgoings for leases within shopping centres. The amendment can specify the component cost of outgoings including services such as security and sanitation. Additionally, monitor any issues in relation to the effectiveness of marketing expenditure.	Legislative amendment
Recommendation 18: Adjust the requirement in section 28 so that outgoings statements for retail leases outside of a shopping centre can be prepared by a Certified Public Accountant, while retail leases within shopping centres will maintain the registered company auditor requirement.	Legislative amendment
Recommendation 19: Amend section 23 to allow parties to mutually agree on cost recovery arrangements where both parties are a shared beneficiary (such as upgrades to improve energy efficiency). Additionally, the Commission recommends the inclusion of a definition of 'capital costs' within the Act.	Legislative amendment
Recommendation 20: Update section 20 to clarify that pharmaceutical-related sales should be excluded from turnover rent.	Legislative amendment

<p>Recommendation 21: Undertake further consultation to consider an update to section 31(4) to allow for the disclosure of valuation information in strip malls and standalone premises, with clear exclusions for shopping centres.</p>	<p>Legislative amendment (further consultation)</p>
<p>Recommendation 22: Progress an amendment to section 44 of the Act to clarify that the notice to the lessee, of the lessor’s intention at end of lease, is required not less than 6 months and not more than 12 months before the expiry of:</p> <ul style="list-style-type: none"> • The lease term (if there are no options), or • The lease extension or option period. 	<p>Legislative amendment</p>
<p>Recommendation 23: Undertake further consultation to consider an amendment to section 39(1)(b) to clarify that the proposed assignee has financial resources or retailing skills sufficient to meet the obligations under the lease.</p>	<p>Legislative amendment (further consultation)</p>
<p>Recommendation 24: Consider a definition or clarification of ‘permitted use’ under section 3 or section 39 to specify a generic category of retail shop, such as the Prescribed List, rather than a specific brand or trading name, for the purpose of lease and assignment under section 39(1)(a).</p>	<p>Legislative amendment</p>
<p>Recommendation 25: Amend section 14 of the Act to remove the prohibition to enable lessors to recover lease preparation expenses in circumstances where the existing lease could be assigned but the parties instead agree to enter a new lease.</p>	<p>Legislative amendment</p>
<p>Recommendation 26: Amend section 41A of the Act to reflect that ongoing liability of the assignor will be released, so long as an updated lessor’s disclosure statement has been provided to the assignee at least seven days before the assignment of the lease.</p>	<p>Legislative amendment</p>
<p>Recommendation 27: Amend section 34A(c) of the Act to specify the appropriate consideration of commercial factors such as exposure to foot traffic, surrounding retail mix, shape or nature of a premises and road frontage.</p>	<p>Legislative amendment</p>
<p>Recommendation 28: Monitor emerging disputes and issues relating to situations where the lessor has not demonstrated to the lessee the criteria for triggering a demolition clause as specified in section 35(1)(a1).</p>	<p>Monitor and assess</p>
<p>Recommendation 29: Removal of Part 11 (response to COVID-19 pandemic) from the Act (retaining relevant savings provisions).</p>	<p>Legislative amendment</p>
<p>Recommendation 30: Extend the existing Part 9A provisions applying to Sydney (Kingsford-Smith) Airport to the future Western Sydney International (Nancy-Bird Walton) Airport.</p>	<p>Legislative amendment</p>

Recommendation 31: Develop the pre-lease fact sheet and digital platform to complement and improve the usefulness of existing support materials. The supporting infrastructure for the Act should help improve outcomes with respect to risks and awareness of:

- lessees taking possession of previous tenant's' fit outs
- side deals, including finance through side deal
- understanding timeframes for option exercise and non-payment of rent
- communication methods agreed to under the lease
- maintenance of the premises
- implications of demolition clauses.

Non-legislative

Part VII Dispute resolution

Recommendation 32: Amend section 68 to limit the effect of Part 4, Division 1 of the *Civil and Administrative Tribunal Act 2013*, to strengthen the compulsory mediation requirement and obligation to participate in mediation prior to a matter being considered at NCAT.

Legislative amendment

About the Commission

The NSW Small Business Commission (the Commission) provides strategic advice, advocacy and affordable dispute resolution services to small businesses in NSW. The Commission's role includes:

- Encouraging government agencies and larger businesses to enter productive working relationships with small businesses.
- Facilitating and encouraging the fair treatment of small businesses.
- Promoting a fair operating environment in which small businesses can flourish.

In addition, the *Small Business Commissioner Act 2013* provides that it is a function of the Commissioner to advise the Minister, either at the Commissioner's own initiative or at the request of the Minister, on any matter affecting small businesses or that is relevant to the Commissioner's objectives or functions.

The role of the NSW Small Business Commissioner under the *Retail Leases Act 1994 (NSW)* (the Act)

The NSW Small Business Commissioner is an independent statutory officer and is also the Registrar of Retail Tenancy Disputes for the purpose of the Act

Pursuant to Part 8, Division 2 of the Act, the Commission assists lessors and lessees of shops to resolve disputes through mediation which includes preliminary assistance and procedural advice.

The Registrar of Retail Tenancy Disputes is appointed by the Minister under section 64 of the Act with the functions conferred by section 65 that include reporting to the Minister on the operation of the Act, while not being subject to direction or control.

Contact the Commission

For further information or about this consultation please contact:

NSW Small Business Commissioner

Megan Bennett

Executive Officer to the NSW Small Business Commissioner

Telephone: 02 9372 8767

Email: megan.bennett@smallbusiness.nsw.gov.au

Part I - Introduction

Retail leases are an essential foundation for many retail businesses. Retail leasing provides retail businesses with access to premises that are convenient and accessible for customers and clients. For lessors, retail leasing can be critical to sustain assets and investment in shopping locations that provide amenity and are appealing to visit.

The Act was introduced in 1994 to foster good leasing practices in the retail industry. The Act prescribes disclosure requirements, prohibits certain practices that are contrary to good leasing practices, and defines standard requirements that apply to all retail leases. The Act supports good leasing practices by specifying processes before the lease, during the lease if disputes arise and at the end of a lease.

The Act defines what is 'retail' through the Prescribed List of business in Schedule 1 and includes other definitions for 'retail shop lease' and 'retail shopping centre' and exclusions on the basis of the size of the leased premises, the length of the lease term and the excluded uses listed in section 6 and Schedule 1A.

About this Review

On 14 November 2022, the NSW Government tasked the NSW Small Business Commissioner with reviewing the Act. The purpose of the Review was to consider whether the Act continues to meet policy objectives and whether original policy objectives remain appropriate.

This Review is informed by feedback from parties representing lessors, lessees and others that play a role in retail leasing arrangements, including through:

- 18 written submissions in response to the discussion paper.
- 98 submissions provided through a survey contained on the NSW Government's 'Have Your Say' portal.
- 22 targeted meetings with stakeholders, including members of the Industry Reference Group and stakeholders that made representations to the Commission as part of this Review.

Stakeholder engagement and participation in review

The Commission wrote to key industry stakeholders in November 2022 inviting them to be a part of an Industry Reference Group. The Commission also met with these members to seek initial feedback to inform this Review.

The Industry Reference Group comprised the following members:

- Real Estate Institute of NSW
- Australian Retailers Association
- Shopping Centre Council of Australia
- The Law Society of NSW
- Pharmacy Guild of Australia (NSW)
- Australian Lotteries and Newsagents Association

The public was invited via the Commission's website, the NSW Government's Have Your Say website, social media posts and electronic direct mail to a select group of stakeholders and small businesses to provide submissions to a discussion paper (released in November 2022) or respond to a survey regarding their experiences with the Act and retail leasing. The survey was hosted on the NSW Government's Have Your Say website.

The Commission wrote to NSW Government stakeholders in November 2022 to invite written submissions and an opportunity to meet with the Commission to provide feedback.

Initial findings from the industry survey and consultation submissions were provided to the Industry Reference Group. Stakeholders who provided a submission were invited to attend a targeted meeting to further discuss their feedback.

The Commission accepted additional requests for meetings and considered any supplementary feedback provided by stakeholders. This included meetings to discuss additional feedback and a supplementary submission. The majority of stakeholders and reference group participants provided constructive contributions and participated professionally in this Review.

Survey feedback

Survey data can be found at **Appendix A**, however the Commission notes the survey was exploratory in nature and is not compatible for statistical analysis due to an insufficient number of responses in the key lessee and lessor categories, as well as practical difficulties in obtaining a representative sample.

While some quantitative results are presented in this Review, they are provided to be indicative of the experiences of lessees and lessors. The survey was predominantly developed to allow respondents to share their experiences in their own words to inform this review. These qualitative responses have not been included for confidentiality reasons.

Key findings and recommendations

The Commission has reviewed feedback and undertaken additional analysis to identify opportunities to facilitate improved outcomes under the Act. Recommendations are grouped into several key areas, including:

- The Act and its objectives
- Defining retail shop businesses
- Entering a lease
- Safeguards of the Act
- Dispute resolution
- Legislative context.

Stakeholder feedback was considered in relation to the intentions of the Act, the NSW Government's Better Regulation Principles, and implications for lessees, lessors and other actors involved in retail leasing. Findings and recommendations intend to improve the efficiency and effectiveness of the Act for all retail leasing industry participants.

In developing findings and recommendations for this review, the Commission first sought to develop a clear statement of objectives via a proposed 'Objects Provision' of the Act. The 'Objects Provision' would provide a framework for the intended role, purpose and functions of the Act. The 'Objects Provision' intends to ensure a common understanding of the scope and intention of the Act by specifying its role in providing minimum safeguards, mechanisms and processes to foster good faith leasing practices.

Further consultation, cost-benefit assessment and review

The Commission notes further consultation and impact analysis, including an assessment of costs and benefits, would be needed to affirm the suitability of legislative amendments in accordance with the Better Regulation Principles. In NSW, legislative or regulatory amendments must be accompanied by a Better Regulation Statement or a Regulation Impact Statement. The Commission supports these processes as appropriate mechanisms to seek further engagement on any proposed amendments.

In other areas the Commission has recommended further policy development and review. This approach has been taken where there are complex issues involved and there is a need for further consideration prior to identifying any specific legislative amendments.

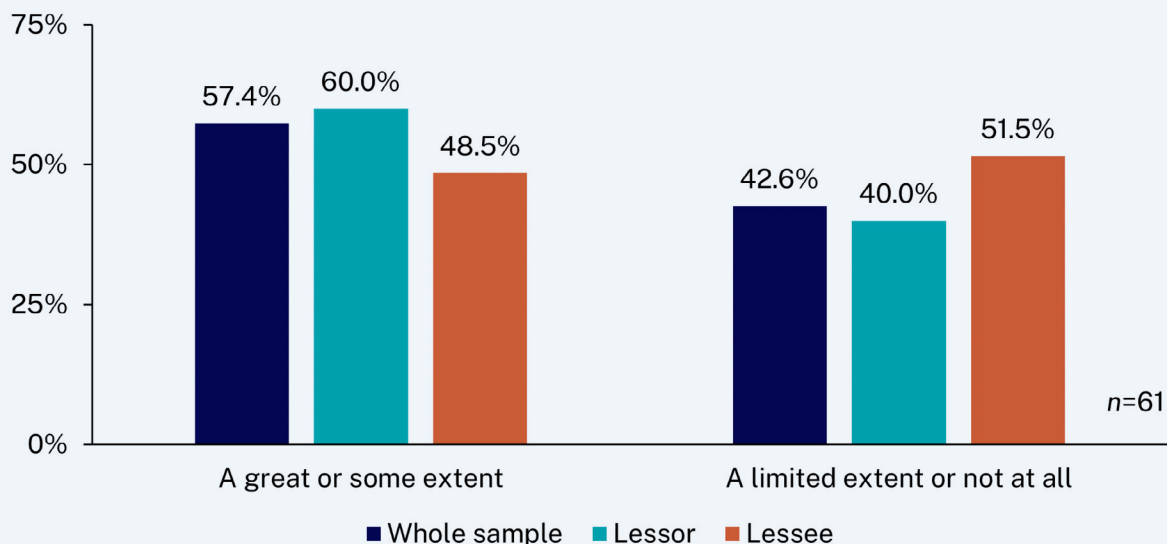
Part II - Overall feedback on the Act

The Act is beneficial to good leasing practices

Leasing participants perceive that the Act is an important legislative instrument for managing the relationship between lessees and lessors, and fostering good leasing practices.

Leasing participants recognise the benefits of the Act for negotiating and entering a lease contract, maintaining and meeting obligations within a lease contract, and managing disputes or resolving conflict. Stakeholders reported that the Act provided a foundation for good leasing practices and was effective in reducing disputes.

Figure 1: The Act encourages good leasing practices¹

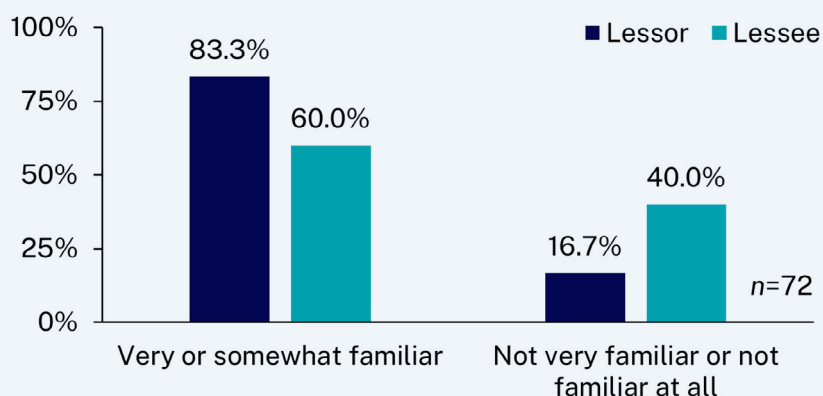


Lessors and lessees have different awareness of the Act

While stakeholder feedback indicates the Act supports good leasing practices, survey respondents indicate that lessors and lessees have different awareness of the Act. Lessors are more likely to be familiar with the details and requirements of the Act, while lessees are less likely to have this familiarity.

Lessees and groups that represent lessees are also more likely to perceive that the purpose of the Act is to provide lessee protection, rather than the broader and more party-neutral concept of fostering good leasing practices.

Figure 2: Familiarity of the Act²



¹ Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.8 for survey question.

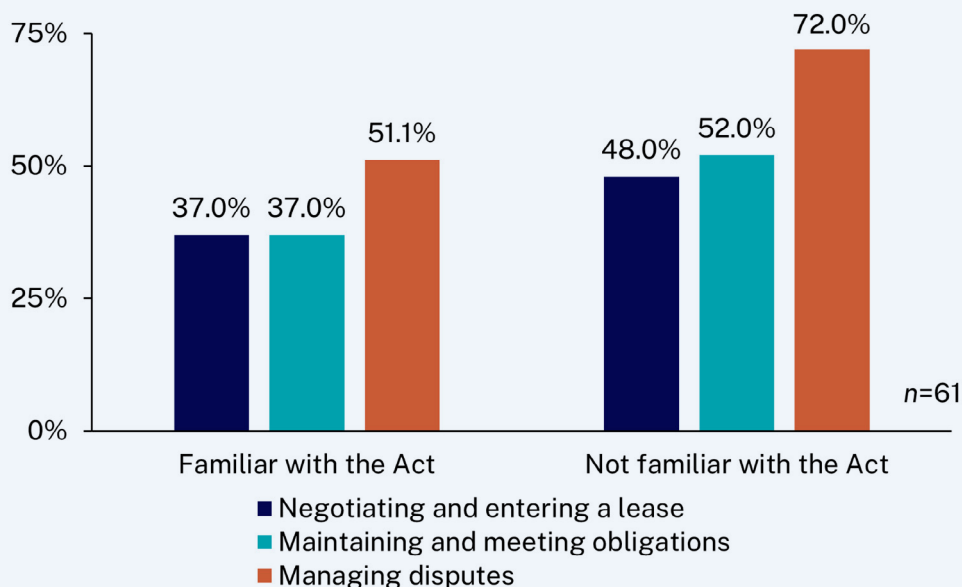
² Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.1 for survey question.

Awareness of the Act influences leasing outcomes

Awareness of the Act appears to be influencing leasing outcomes. Survey respondents who were very familiar or somewhat familiar with the Act had better leasing experiences than survey respondents who were not very familiar or not at all familiar.

Submissions and targeted consultation sessions also raised concerns that some lessees and lessors do not understand the requirements of the Act or do not appropriately practice their rights or obligations under the Act. Some submissions and targeted consultation sessions raised concerns regarding gaps in the expertise of industry actors such as legal practitioners, advisors and agents.

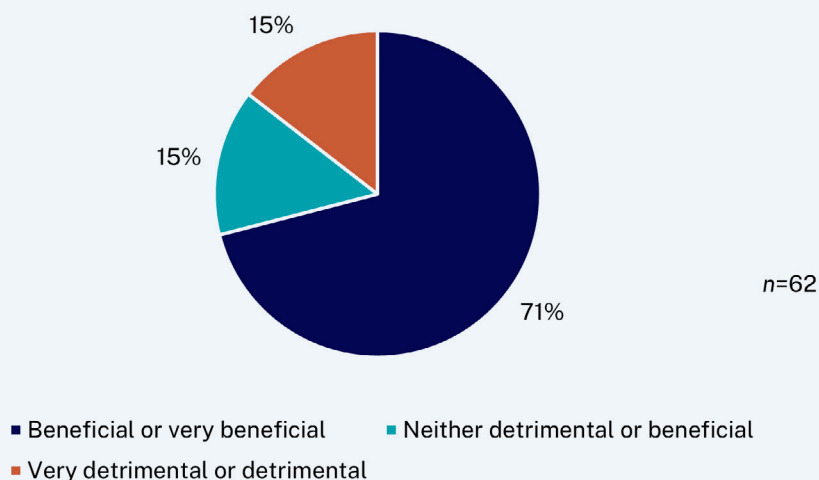
Figure 3: Respondents that indicated very poor and poor experiences of leasing, based on their awareness of the Act³



Improving pre-lease processes

Most survey respondents and submissions recognised that pre-lease processes, such as the disclosure of all costs and liabilities, are essential for fostering good leasing practices. However, submissions, targeted consultations and survey comments indicate it can be challenging for lessees and lessors to complete these processes. These leasing participants identified there could be benefits in improving and optimising processes for entering a lease.

Figure 4: How beneficial the pre-lease disclosure of all costs and liabilities under the lease are in encouraging good leasing practices⁴



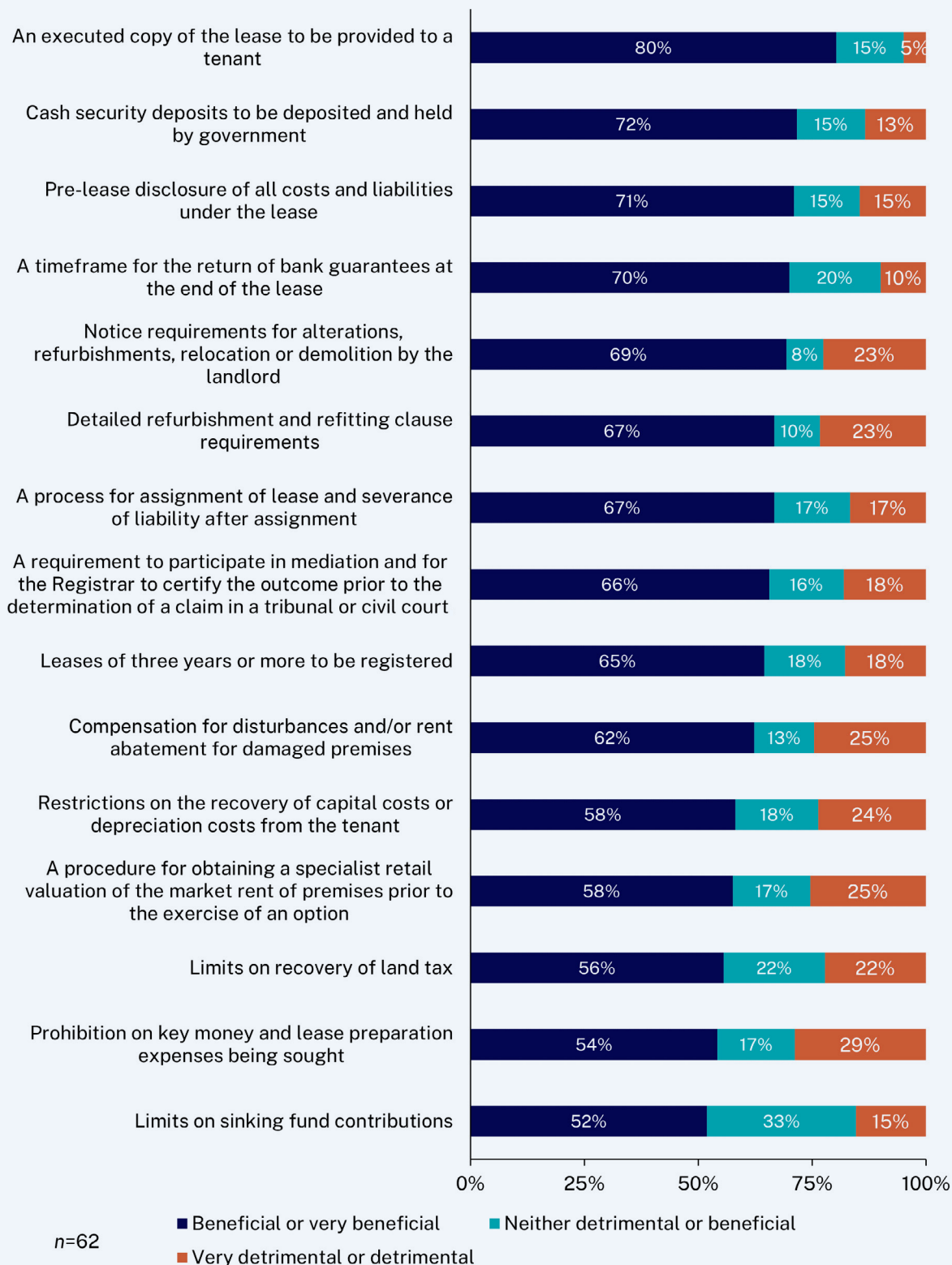
³ Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.5 for survey question.

⁴ Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.7 for survey question.

Features of the Act are beneficial

Leasing participants perceived most features of the Act as beneficial. However, some leasing participants recommended targeted amendments to features where there was a lack of clarity in the Act, unintended outcomes, or changes in the retail leasing environment.

Figure 5: Respondents that are familiar or somewhat familiar with the Act perceive the features of the Act as beneficial⁵



⁵ Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.6 for survey question

Part III – The Act and its objectives

The Act was introduced in 1994 to foster good leasing practices in the retail industry.

In 1988, the then Minister for Business and Consumer Affairs resolved to develop a mandatory code of practice for the retail industry, particularly retail shopping centres. The proposed mandatory code was developed over two years and was expanded to include all retail shops, with industry bodies involved in the process.

During the development process, proposals for a mandatory code lapsed; however further negotiations occurred among industry representatives. Subsequently, a voluntary code of practice was launched on 1 January 1992 incorporating most of the provisions of the mandatory code proposal.

After a review in 1993 by the sponsoring industry bodies, it was concluded that the voluntary code had many deficiencies. The dispute resolution procedures were failing and there was significant non-compliance with the code. Acknowledging this, the then NSW Government proceeded to prepare legislation for retail leasing which resulted in the introduction of the Act.

Supporting good leasing practices

The Act prescribes disclosure requirements, prohibits certain practices that are contrary to good leasing practices, and defines standard requirements that apply to all retail leases. The Act specifies processes before the lease, during the lease, if disputes arise and at the end of the lease (see **Figure 6** below). Other legislation that regulate retail and commercial leasing includes the *Conveyancing Act 1919* and the *Real Property Act 1990*.

Figure 6 – Supporting good leasing practices

Before the lease	During the lease	If disputes arise	End of the lease
<ul style="list-style-type: none">• Specifies what the lessor must disclose to the lessee.• Specifies processes for calculating market rent.• Requires cash bonds to be lodged with the Retail Bonds Scheme.• Requires the lessee to confirm and acknowledge the disclosures.• Requires leases over three years to be registered.• Requires both parties to have a co-signed copy of the lease.	<ul style="list-style-type: none">• Restriction on lessors recovering certain costs and limits on the recovery of certain outgoings.• Processes for managing disturbances from the lease, such as relocation, demolitions, alternations/refurbishment, and damage to the premises.• Some restrictions on rent adjustments.• Transparency for certain types of information and confidentiality requirements for turnover data.	<ul style="list-style-type: none">• A compulsory mediation function to resolve disputes.• A requirement to participate in mediation and for the Register to certify the outcome prior to the determination of a claim in a tribunal or civil court.	<ul style="list-style-type: none">• Opportunity for the lessee to assign, renew or extend.• Timeframes for the return of bank guarantees at the end of the lease.• Regime for giving notice at the end of the lease.

For leases within its jurisdiction, the Act also specifies certain requirements and restricts what terms can be included within a retail lease. These requirements and restrictions include but are not limited to:

- Prohibition on key money and lease preparation expenses being sought.
- Provisions seeking capital costs or depreciation costs from the lessee to be void.
- Limits on sinking fund contributions and recovery of land tax.
- Restrictions on ratchet clauses and a procedure for obtaining a specialist retail valuation of the market rent of premises prior to the exercise of an option.

Previous reviews

Since its introduction, the Act has undergone several reviews and amendments, with the most substantial amendments occurring in 1998, 2005, 2006 and 2017. In 2023, the *Retail Leases Regulation 2022* (the Regulation) was introduced.

The Act was amended in 2005 and 2006 to improve the functioning of the Act, including the creation of a Retail Bond Scheme, improved processes for the assignment of a lease, improved access to information, and an expanded application of the Act to more leases.

The most recent significant amendments to the Act were made in 2017 to give effect to recommendations arising from a statutory review of the Act. Amendments were introduced to increase transparency and certainty in the NSW retail leasing sector. This included simplifying key processes to improve standards of conduct and operational efficiency.

On 1 January 2023, the Regulation was introduced as the principal regulation under the Act, following consultation and publication of a Regulatory Impact Statement.⁶ The Regulation will have the effect of expanding the types of businesses prescribed as retail businesses under Schedule 1 of the Act to include:

- Gymnasiums and fitness centres, including yoga, barre, pilates and dance studios
- Small bars with a maximum patron capacity of 120.

Principle 7 of the NSW Government Better Regulation Principles specifies that regulation should be periodically reviewed and, if necessary, reformed to ensure its continued efficiency and effectiveness.

Objectives of the Act

As already stated in this Review, the Act was introduced to foster good leasing practices in the retail industry. The Act provides safeguards for both parties to the lease and a dispute resolution mechanism to help parties resolve most of their disputes without having to go to court. In practice, the Act strives to provide a balance between establishing lessor and lessee rights and obligations and enabling commercial terms to be determined through negotiation and market conditions.

It is important to note, the Act does not prescribe ‘safe harbour’ protections or related special conditions for small or large businesses despite perceptions and representations of some stakeholders.

The Commission has endeavoured to assess the broad range of issues raised by stakeholders as part of this Review against the objectives of the Act. This includes the objectives of the Act as defined in the 1994 inaugural second reading speech and materials accompanying subsequent amendments to the Act. However, in some instances, the objectives of the Act remain open to interpretation.

Stakeholder feedback demonstrates diverse views and understanding of the Act’s objectives. Stakeholders appear to have varying expectations of the purpose of the Act, including how the Act functions to promote good leasing practices and provide safeguards for parties to a retail lease. Some stakeholders favour a more interventionist role for the Act in protecting the interests of lessees. Other stakeholders emphasised it is the responsibility of parties to protect their interests by negotiating and agreeing to lease terms that meet their commercial needs.

Introducing an ‘Objects Provision’

The Act currently does not have an ‘Objects Provision’ included in the legislation to describe the policy intent and purpose of the Act.

An objects clause is a provision, usually located at the beginning of legislation, that outlines the underlying purposes of the legislation. It can be used to resolve uncertainty and ambiguity in relation to the intended purpose of legislation.

⁶ Small Business Commissioner (NSW), Draft Retail Leases Regulation, Regulatory Impact Statement (2022). [Available here.](#)

South Australia and NSW are currently the only states that do not provide any specific provision stating the objectives or main purpose of their retail tenancy legislation. Victoria, Queensland, Tasmania and the Northern Territory include an ‘objects’ or ‘main purpose’ provision. The Australian Capital Territory and Western Australia have incorporated a long title in their legislation to provide details about the purpose of the legislation (see **Appendix B**).

Perhaps given the absence of an ‘Objects Provision’ stakeholders have varying understandings of the Act’s objectives. This includes varying expectations of the Act’s role in fostering good leasing practices, providing safeguards to both parties, and providing a dispute resolution function.

To address these varied understandings and expectations, the Commission recommends that the NSW Government considers the objectives of the Act and that an ‘Objects Provision’ for the Act be developed.

An ‘Objects Provision’ would assist in providing a clearer foundation to assess whether the Act is achieving its objectives in the future and would provide greater clarity as to how the NSW Government intends to achieve its objectives.

While it is ultimately the role of the NSW Government to determine the objectives of the Act, this Review considered and recommended potential elements that could be included as part of an ‘Objects Provision’. The proposed elements of the ‘Objects Provision’ are specified in Recommendation 1.

While the Commission proposes the approach of implementing an ‘Objects Provision’, alternative approaches could be considered if they achieve the outcome of providing greater clarity of the Act’s objectives.

Clarifying current objectives

The current objectives of the Act have primarily been communicated through the Parliamentary Process. The Commission recommends the ‘Objects Provision’ should draw on the themes of explicit requirements and cost effective, timely dispute resolution expressed in the 1994 inaugural second reading speech:

‘The bill...is intended to foster good leasing practices in the retail industry, nothing more and nothing less. The Government does not wish to interfere in commercial agreements between two parties. It seeks to ensure that retail leasing agreements are explicit as to the requirements of both parties and that they are entered into from a position of reasonably equal negotiation strength. Where an agreement does end in dispute, the bill provides for cost effective and timely dispute resolution.’⁷

Specifying these objectives would help clarify the purpose of the Act. For example, some stakeholders proposed new lessee protections that would assume a role for the Act beyond what can be inferred from the 1994 second reading speech.

Specifying the scope of safeguards, mechanisms and processes

Consultation feedback suggests there is merit in clarifying the objectives of the Act to support a more consistent understanding of the roles and responsibilities of individual parties when considered in the context of the Act’s safeguards, mechanisms and processes.

The current approach of the Act is to provide maximum flexibility and encourage parties to be responsible for ensuring their own needs are met. Minimum safeguards, mechanisms and processes are specified to avoid common pitfalls and practices which are particularly detrimental to parties. This includes disclosure requirements that seek to ensure all financial expenditure and other important information is prominently disclosed before a lease is entered into.

To support the industry’s understanding of this balance and provide flexibility for lessees and lessors to negotiate and manage their retail lease, the Commission recommends the ‘Objects Provision’ specifies an intention for the Act to:

- Provide minimum safeguards, mechanisms and processes to empower lessees and lessors to negotiate and manage their retail lease.
- Ensure financial obligations and other important information is disclosed before a lease is entered into.
- Ensure both parties experience reasonably transparent negotiation and leasing process.

⁷ NSW Legislative Assembly, Retail Leases Bill Second Reading (20 April 1994). Available at: [Retail Leases Bill](#)

Specifying the participation of lessors and lessees of all scales

Stakeholder feedback identifies a perception that, while there are many small-scale lessees, lessors are typically large and well-resourced organisations. This perception does not recognise the diversity that is within the retail leasing market, which includes lessees and lessors of all scales.

There is an opportunity for the 'Objects Provision' to state that the Act functions to enable lessors and lessees of all sizes to participate in retail leasing.

Defining good faith leasing practices

Some concepts expressed in the inaugural second reading speech, such as 'good leasing practices', are not explicitly defined and there are varying interpretations among the retail leasing industry.

Good leasing practices are often interpreted as those favourable to lessees, rather than practices that are efficient, support positive outcomes for all parties, and facilitate a common understanding of parties' rights and obligations under the lease. From this perspective, lessees may interpret lessors' behaviour as unfair, regardless of whether this behaviour is aligned with the agreed conditions of the lease.

To improve understanding of good leasing practices and improve leasing outcomes, the 'Objects Provision' should define good leasing practices as 'good faith' practices that support the stated objectives of the Act.

'Good faith' is a term used in Australian law in both common law and legislation. Expert legal advice, obtained in the 2016 review of the Act, indicates the use of 'good faith' can provide a way to distinguish if the actions of either party are unreasonable.

Adopting good faith in the 'Objects Provision' requires a definition that ensures clear and appropriate scope, and captures established common law requirements. This could include:

- Acting honestly
- Not acting arbitrarily and capriciously or for an improper purpose
- Co-operating to achieve the purpose of the retail lease
- Reasonableness
- Fidelity to the bargain
- Considering the interests of the other party.

Good faith leasing practice would be applied to negotiations, activities or disputes under the lease. This could include: entering into, renewing, extending, or otherwise dealing with a retail lease; performing a retail lease; and resolving or attempting to resolve a dispute relating to a retail lease.

A party will not have acted contrary to good faith if, after considering the interests of the other party, they prefer their own legitimate interests.

Recommendation 1 – An ‘Objects Provision’ for the Act

Include an ‘Objects Provision’ within the Act.

This ‘Objects Provision’ is proposed to include the following elements:

- (1) *To foster good faith leasing practices in retail settings by:*
 - (a) *Providing minimum safeguards, mechanisms and processes to empower lessees and lessors to negotiate and manage their retail lease*
 - (b) *Ensuring that all financial obligations and other important information is disclosed before a lease is entered into*
 - (c) *Ensuring the requirements of both parties are explicit and that both parties experience reasonably transparent negotiation and leasing process*
 - (d) *Providing for cost effective and timely dispute resolution.*
- (2) *Functions to enable lessors and lessees of varying sizes and scales to participate in retail leasing.*
- (3) *Good faith leasing practices is defined as:*
 - (a) *Acting honestly*
 - (b) *Not acting arbitrarily and capriciously or for an improper purpose*
 - (c) *Co-operating to achieve the purpose of the retail lease*
 - (d) *Reasonableness*
 - (e) *Fidelity to the bargain*
 - (f) *Considering the interests of the other party.*

Part IV – Defining retail shop businesses

The Act currently defines a retail shop business through a number of sections and schedules across the Act and the Regulation. These sections and schedules include:

- A definition in section 3 (1) of the Act.
- A Prescribed List of Retail Shop Businesses (the Prescribed List) in Schedule 1 of the Regulation.⁸
- Certain premises excluded from the operations of the Act in sections 5, 6, 6A and 9A.
- The excluded uses specified in Schedule 1A.

Effectively, these components define a retail shop as premises that are predominately or wholly used for the carrying on of one or more of the businesses listed in the Prescribed List, and that have a lettable area of under 1,000 square metres.

A lease for a type of business not specified in the Prescribed List may also be captured by the Act if the premises are in a shopping centre. The Act defines a shopping centre according to a range of factors, including:

- The clustering of at least five premises, with single ownership or comprising within a single strata plan.
- Located in a single building or buildings adjoined or separated by common or other areas with the same ownership.
- Generally regarded as a shopping centre, shopping court or shopping arcade.

The Act does not apply to leases for retail shop premises for a term of less than 6 months and greater than 25 years.

Stakeholder feedback

Most stakeholders support this approach as it enables retail businesses to be clearly identified. However, some made suggestions to alter how the Act defines retail shop businesses. Suggestions included:

- Considering a more generic definition of ‘retail’ based on principles that can be applied to a range of business activities.
- Limiting the applicability of the Act by reducing the defined lettable area of retail and restricting to small businesses.
- Expanding the scope of the Act to cover new business types not currently listed in the Prescribed List.

Feedback was also provided on the legislative arrangements that provide for the definition of retail (being the Act and the Regulation), and methodology applied to determining the predominate use of mixed retail and commercial businesses.

During the consultation, some stakeholders advocated for the inclusion of small motels in the Act due to the impact of ratchet clauses on rent adjustments in commercial leases for small motels. However, the Commission assesses that including small motels in the Act raises a number of challenges and there may be more effective ways to assist small motel operators. It should be noted that this issue has been considered in detail by the Commission over the last three years.

The common meaning of ‘retail’ and the scope of the Act

There are impracticalities in developing a specific or principles-based definition of what types of businesses or activities constitute a ‘retail’ shop. The retail mix has diversified over time and is no longer limited to a narrow range of goods and services.

⁸ The Prescribed List of Retail Shop Businesses is specified in Schedule 1 in the Retail Leases Regulation 2022 (NSW). Prior to the enactment of this regulation, the Prescribed List of Retail Shop Businesses was specified in Schedule 1 of the Act, which has now been repealed. The Prescribed List of Retail Shop Businesses will be referred to as the ‘Prescribed List’ throughout the remainder of this Review.

It would be challenging for the Act to provide a clear distinction between when the provision of a good or service is within the meaning of retail and when it is not. While retail is defined in other legislation, these definitions encompass broader definitions of the provision of goods which may not be appropriate (such as wholesale) or do not include or specifically define retail services. Conceptually, it is difficult to differentiate when a good or a service is offered in a retail setting and when it is not without also looking at broader contextual factors which may vary from case to case.

In the absence of an immediately apparent approach to defining retail, policymakers should be guided by the practical effect of the Act and the circumstances where its requirements are most likely to be beneficial.

For example, the Act provides certain safeguards where a party to a lease may experience detriment due to locational factors, such as exposure to foot traffic, if they were compelled to relocate or the lease was prematurely terminated. The Act should broadly provide these protections to business types which are commonly located in shopping and retail precincts. This is because factors such as their location, foot traffic and retention of goodwill mean they cannot easily relocate without potential ramifications for their business. In contrast, the locational factors for an office space may be less critical and the case for these safeguards is less strong.

While the Act also provides additional protections and safeguards which are unrelated to locational factors (such as the dispute resolution provisions of the Act), they are supportive of good leasing outcomes. The Commission notes the practices required by the Act could support favourable outcomes in other commercial lease arrangements, however it is beyond the scope of this Review to consider arrangements applying to leases outside of the jurisdiction of the Act.

Advantages and disadvantages of the Prescribed List

Some stakeholders noted the Act's current approach of applying the Prescribed List of retail shop businesses can make it more challenging for the Act to apply to new and emerging forms of retail. Some felt there were benefits to introducing a principles-based definition with specific exclusions, similar to the approach taken in Victoria's Retail Leases Act 2003.

The Retail Leases Act 2003 (VIC) also includes in section 5 the ability for the Minister to make a determination of whether a business is a 'retail business' for the purpose of the application of the Act.⁹ The Retail Leases Act 2003 (VIC) defines retail premises within section 4 as:

In this Act, retail premises means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for –

the sale or hire of goods by retail or the retail provision of services; or

the carrying on of a specified business or a specified kind of business that the Minister determines under section 5 is a business to which this paragraph applies.

The Retail Leases Act 2003 (VIC) then proceeds to outline the types of premises the meaning of retail premises does not include. This provision is quite lengthy and detailed.

Other feedback to this Review identified merits of the Act, including the approach to defining retail, particularly regarding the Prescribed List. While relying solely on the Prescribed List is less flexible than alternative definitions, stakeholders indicated they valued the certainty provided by the approach.

While adopting a less prescriptive definition may be better able to accommodate new forms of retail, there are other limitations. For example, determining whether a lease is within the jurisdiction of the Act may become more complex in circumstances where the definition applies ambiguously. This may require lessees and lessors to read guidance or obtain legal opinion before entering a lease.¹⁰ There is also the potential that a party to a lease may erroneously assume a lease is not within the jurisdiction of the Act and therefore fails to comply with their obligations.

⁹ For example, ministerial determinations excluded premises used for the provision of legal services by barristers from the scope of the Act.

¹⁰ In Victoria there is a 14-page guide to explain the application of the definition. See Guidelines to the Retail Leases Act 2003 – What are "retail premises"? (2019). Available at: [Retail Premises Guidelines](#)

A further consideration relates to national consistency with the NSW approach varying from other jurisdictions. Some industry participants advocated for a national approach to defining retail with a view to reducing complexity and streamlining operations for lessors and lessees that operate across multiple jurisdictions. The Commission notes a national consensus is yet to emerge and there is no nationally harmonised definition for NSW to adopt. Further matters relating to national harmonisation are considered later in this Review in Part VIII.

On balance, the Commission recommends the current approach of the Act to defining retail shop businesses should not be changed. However, as this Review outlines, the legislative instruments that provide for the definition of retail can be updated and streamlined, including to ensure the Act's definition of retail is responsive to new and emerging forms of retail.

Limiting lessee protections to small businesses

Some industry participants expressed a view that the safeguards of the Act should be limited to small businesses, with exclusions from certain requirements subject to the size of the lessee. Some raised circumstances where a large retail company may be the lessee while the lessor is a small 'mum and dad' investor. It was suggested larger retail companies are sufficiently well resourced to protect their own interests without the requirements of the Act.

Some noted the scope of other state retail leasing legislation where larger businesses are directly or indirectly excluded. For example, by excluding publicly listed companies (directly) or by excluding leases with rent over a certain value (indirectly). Specific examples include:

- Victoria, Western Australia and the Northern Territory have excluded Australian Securities Exchange (ASX) listed entities from their respective retail tenancy legislation. South Australia has excluded all public company lessees from the application of their retail tenancy legislation.
- The Australian Capital Territory excludes listed entities when the lettable area of the premises exceeds 1,000 square metres.
- South Australia and Victoria exclude leases where the annual rent or occupancy costs exceed the threshold prescribed by their respective legislation. (This is currently \$400,000 rent per annum exclusive of GST for South Australia and \$1m in occupancy costs for Victoria).
- South Australia also excludes leases entered into by authorised deposit taking institutions, companies authorised to carry on the business of insurance, and government bodies.

There are no similar exclusions in the retail tenancy legislation for Queensland or Tasmania, however both states exclude entities based on lettable area of more than 1,000 square metres.

Previous reviews¹¹ in other jurisdictions have concluded that larger businesses, such as companies listed on the ASX or any recognised stock exchange, have the financial capacity to make informed business decisions and do not require the safeguards of retail leasing legislation. Exclusions for publicly listed companies and cost thresholds have been adopted in some jurisdictions as they are readily identifiable means of distinguishing between small and large businesses.

The Victorian retail tenancy legislation illustrates a policy focus of lessee protection that is echoed in the other states and territories. The Retail Leases Regulations 2023 Regulatory Impact Statement notes:

The Act originally came into operation as a result of a comprehensive review in 2001 (2001 Review) to ensure Victoria's retail tenancy laws better protect small and medium sized retail tenants.¹²

A key policy principle used to guide the development of the current Victorian retail leases legislation is that '...retail leases legislation should only protect small and medium sized retail businesses.'¹³

11 Department of Jobs, Skills, Industry and Regions (Vic), Retail Leases Regulations 2023 Regulatory Impact Statement (February 2023). Available at: [Retail Lease Regulations 2023 Regulatory Impact Statement](#) | Department of Business and Innovation (Vic), Retail Leases Regulations – Regulatory Impact Statement (February 2013). Available at: [Retail Leases Regulations 2013](#)

12 Department of Jobs, Skills, Industry and Regions (Vic), Retail Leases Regulations 2023 Regulatory Impact Statement (February 2023). Available at: [Retail Lease Regulations 2023 Regulatory Impact Statement](#)

13 Department of Jobs, Skills, Industry and Regions (Vic), Retail Leases Regulations 2023 Regulatory Impact Statement (February 2023). Available at: [Retail Lease Regulations 2023 Regulatory Impact Statement](#)

However, there are some nuanced differences in the focus of retail leasing legislation in other jurisdictions when compared with NSW. There has been considerable change to the retail leasing industry in NSW since the inaugural Act was introduced in 1994 and the retail leasing industry has evolved differently in each state. In NSW, the objective of retail tenancy legislation is less focussed on lessee protection with a stronger focus on ensuring leasing practices produce good outcomes for all parties. As mentioned earlier in this Review, the NSW Act does not define size of business.

While the Act applies some safeguards to support lessees with common pitfalls, it is not currently designed to preference lessee interests over those of lessors. Instead, the purpose of the Act is to foster good leasing practices to improve outcomes and reduce the likelihood of disputes to the benefit of both small and large-scale parties, including where the lessor is a small-scale investor.

The Commission acknowledges the need for retail leasing regulation may vary from lease to lease depending on parties' experience, knowledge of retail leasing practices and ability to protect their interests during negotiation. However, even if the Act may be less beneficial in certain situations, it may be problematic to introduce 'right size' requirements of the Act depending on the characteristics of one or more party to a lease. This would contribute additional complexity and exclude some leases where the parties would benefit from the requirements of the Act regardless of their size. In addition, restricting the Act may unintentionally disadvantage small businesses, such as if it encourages lessors to preference commercial lease negotiation compared to retail lease negotiations.

Some stakeholders suggested excluding very large lessees (such as publicly listed companies) from certain requirements of the Act, particularly where such requirements are unnecessary due to the lessee's ability to protect their own interests. However, these submissions to the Commission did not make clear which specific requirements of the Act are problematic and the Commission is reluctant to recommend exclusions without a clear policy rationale.

The Commission's recommended approach is to balance the requirements of the Act so they reflect best practices and are appropriate for both small and large-scale lessors and lessees.

As reflected in Recommendation 1, the Commission's proposed 'Objects Provision' specifies that the Act 'functions to enable lessors and lessees of varying sizes and scales to participate in retail leasing'. As such, the Commission does not recommend exclusions based on business size.

The Commission notes the Act's exclusion of premises larger than 1,000 square metres continues to limit the scope of the Act to larger retail premises that may typically be leased by larger businesses.

Reducing the lettable area of retail

Other feedback recommended reducing the square lettable area of retail to 500 square metres, arguing that many retail shops that are at the upper end of the current 1,000 square metres threshold are resourced to undertake commercial lease negotiation.

Retail operating in premises that are between 500 and 1,000 square metres are a significant proportion of retail stores. The current threshold of 1,000 square metres was selected as it has the effect of excluding some larger supermarkets, department stores and other large format retail shops, but generally captures the diverse range of small to medium retail businesses. Reducing the scope of the Act to retail shops of less than 500 square metres may have the effect of creating only partial coverage for many of the business types listed in the Prescribed List. Business types that require large floorspaces, such as carpet retailers or smaller neighbourhood supermarkets, could be unfairly excluded from the scope of the Act.

The Commission is unaware of any specific challenges warranting a reduction in the lettable area restriction to 500 square metres and does not recommend change.

Recommendation 2– Definition of retail shop

Continue to define retail by the definitions in the Act and the Prescribed List in Schedule 1 of the Regulation and monitor for emerging issues.

Identifying a definition and methodology for predominate use

The Act defines retail shops as premises that are used or proposed to be used wholly or predominantly for the carrying on of one or more of the businesses in the Prescribed List. Some stakeholders proposed the concept of predominate use be more clearly defined to avoid ambiguity for businesses that are mixed retail and commercial businesses.

The Act does not define any specific considerations to be used when apportioning 'use' of a premises across two or more alternative uses (for example, financial measures such as revenue, or physical indicators such as the share of floorspace dedicated to different activities). Currently, predominate use is considered by the NSW Civil and Administrative Tribunal (NCAT) or the courts on a case-by-case basis with the totality of circumstances taken into account. Case law indicates the criterion for predominate use is when more than 50 per cent of the business is categorised as a retail business (as listed in the Prescribed List). Predominate use is also considered to be the most effective proportion of the premises' use, defined by factors such as revenue, expenditure, sales and branding.

The Commission is unaware of any significant volume of disputes relating to predominant use. There is also no longer a need to clarify the meaning of predominant use for future leases involving these specific activities as small bars and gyms are now listed in the Prescribed List. The Commission recommends further monitoring and, should ongoing issues present, opportunities to clarify predominant use should be explored.

Recommendation 3 – Definition and methodology for predominate use

Monitor for any disputes for hybrid businesses in relation to the jurisdiction of the Act to determine whether legislative amendment to define 'predominant use' is warranted.

Reviewing the Prescribed List of retail shops

While the Commission recommends maintaining the Prescribed List for the purposes of defining retail, there are alternative avenues to ensuring the Act is responsive to the evolving retail landscape.

Stakeholder feedback indicates the main limitation of the Prescribed List is that it is less responsive to emerging forms of retail. However, this limitation can be partially managed through regular review of the business types included.

Currently, the Regulation is due to be automatically repealed on 1 September 2028. This provides an opportunity to review and re-enact the Regulation. However, to improve responsiveness to emerging and new forms of retail, the Commission recommends re-evaluating the Prescribed List, approximately every three years or whenever a need arises, to ensure new forms of retail are included and appropriately captured.

This aligns with the NSW Government Guide to Better Regulation, specifically Principle 7, which refers to the periodic review of all regulation.

As noted previously, the Commission supports the scope of the Act applying to businesses commonly located in a retail or shopping precinct. The purpose of re-evaluating the Prescribed List is to capture emerging retail businesses in these locations, rather than broadening the scope of the Act to an increasing number of business activities. Factors justifying the inclusion of new business types in the regulation should be limited to:

- The emergence of new business models, commonly located in a retail or shopping precinct, that were not previously in existence.
- Removing ambiguity as to whether the Act applies to business types that do not neatly fit into one or more of existing listed business types.
- Extending the jurisdiction of the Act where there is a clear case for regulatory intervention and the Act is the most appropriate instrument to achieve policy objectives.

The Commission notes any consequential amendments to the Regulation containing the Prescribed List would require a Regulatory Impact Statement to assess impacts and determine that benefits outweigh any costs.

Recommendation 4– Monitor the Prescribed List

Assess and review the Prescribed List in Schedule 1 every three years to capture emerging types of retail.

Exclusions in the Regulation

While the Prescribed List is now included in the Regulation, some feedback suggested that Schedule 1A (which sets out excluded uses) should not remain in the Act. To streamline this regulatory arrangement, the Commission supports relocating Schedule 1A Excluded Uses to the Regulation.

Recommendation 5– Relocate Schedule 1A to the Regulation

Relocate Schedule 1A to the Regulation to streamline legislative arrangements.

Clarifying ancillary rights

Some stakeholders indicated there is confusion about how the Act applies to retail leases that include licences for ancillary rights (for example, car parking, signage or storage). Many of these ancillary uses are currently listed as excluded uses in Schedule 1A.

These stakeholders advise that section 5 and section 79 of the Act can create confusion when read together. Section 5 specifies certain retail shops excluded from the operation of the Act, whereas Section 79 specifies leases partly for retail shops and partly for other premises.

Feedback suggested the Act be clarified to ensure premises used for car parking, signage or storage conferred or used in conjunction with operating a retail business are within the scope of the Act. Stakeholders raised concerns that the current framework may unnecessarily limit the operation of the Act in relation to these ancillary rights.

The Commission recommends the Act is amended to clarify an exception to the section 5(d) exclusions where the ancillary rights are defined within the lease.

Recommendation 6– Clarifying ancillary rights

Amend section 5(d) to clarify an exception for ancillary rights excluded by Schedule 1A where the spaces (such as car parking, signage or storage) are conferred or used in conjunction with operating the primary business of the retail lease.

Small motels

During the consultation process, some stakeholders who operate or represent small motels advocated for the inclusion of motels in the Act. These stakeholders identified that ratchet clauses, allowed in commercial leases but not in retail leases, may result in rent increases that are out of step with current market rates and the growth of the lessee's business over time. The Commission has also received representations from Dr Joe McGirr MP, Independent Member for Wagga Wagga.

Ratchet clauses allow the lessor to increase rent under predetermined processes (such as a rent review) but prevent rent from falling if those processes would otherwise give rise to a reduction in rent (such as if market rents fall). As small motels are often on long term leases that are at least 25 years, ratchet clauses can lead to a conflict between the rent committed to under historic leases and current market rents.

While some small motels may benefit from a legislative prohibition on ratchet clauses, there are challenges to including small motels in the Act. For example, it is not uncommon for motel leases to commence with periods between 25 and 30 years. Leases of 25 years or more are currently excluded under the Act. Many small motels also have lettable areas larger than 1,000 square metres, particularly once non-room parts of the premise are considered (such as a lobby or car park).

Further, contemporary concerns relating to ratchet clauses would appear to relate to historical leases. It may be problematic to apply retrospective restrictions to ratchet clauses agreed to in historical leases as this would interfere with previously negotiated rent and allocation of risk.

Having considered this for many years, the Commission does not consider it appropriate to include motels within the definition of retail for the purposes of extending the Act's prohibition of ratchet clauses in leases. While some features of the Act may be beneficial to motel leasing arrangements, the Act itself is not structured in a manner that is suited to motel leasing arrangements. Even if motels were included in the Prescribed List, only a subset of them would meet the definition of retail. There may also be unintended consequences associated with applying other requirements and restrictions of the Act to motel leases.

Given stakeholders are seeking to extend the Act to prevent the inclusion of ratchet clauses in leases, and not necessarily to gain the broader benefits of the Act, the Commission favours consideration of a more targeted approach. As such, the Commission recommends further engagement with the accommodation industry to better understand the problem and define potential policy objectives. Should a specific safeguard against ratchet clauses be warranted, consideration should be given to whether it could be implemented through alternative legislation, such as the *Conveyancing Act 1919* or the *Real Property Act 1900*. The Commission notes different considerations may apply when considering the suitability of potential arrangements applying to new and historical leases.

Recommendation 7– Consider opportunities to improve outcome for small motels

Consideration be given to opportunities to improve outcomes for small motels experiencing poor commercial arrangements due to ratchet clauses. This could include consideration of regulatory options within the *Conveyancing Act 1919* or the *Real Property Act 1900* for new leases (for examples, compulsory mediation provisions in leases), and non-regulatory options outside of the Act to support improved outcomes involving historic leases.

Part V – Entering a lease

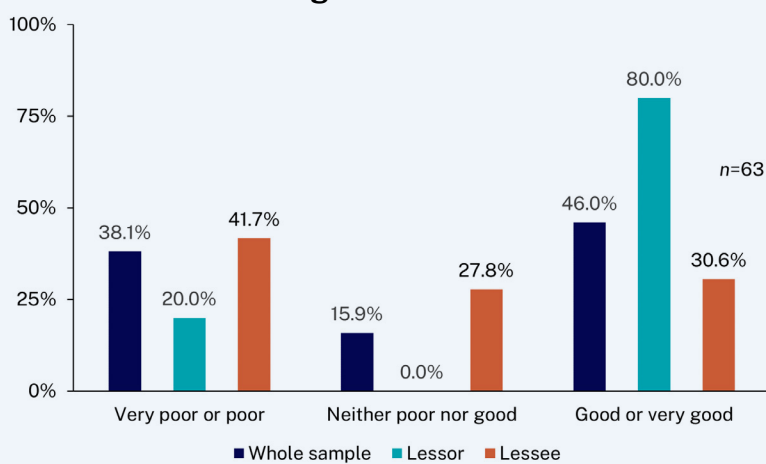
Consultation feedback indicates various stages of entering a lease can be challenging for both lessees and lessors, including negotiation, disclosure and lease execution.

Lease negotiation and execution is influenced by a range of factors, including:

- Processes legislated in the Act
- Knowledge and expertise of lessors and lessees
- Knowledge and expertise of agents, advisors and legal practitioners
- Complexities within the disclosure statement process
- Complexities associated with calculating the cost of outgoings.

Survey results, shown in **Figure 7**, indicate the experiences of parties who are familiar with the Act when entering and negotiating a lease can vary significantly. However, lessors appear to have a more positive experience when entering and negotiating a lease.

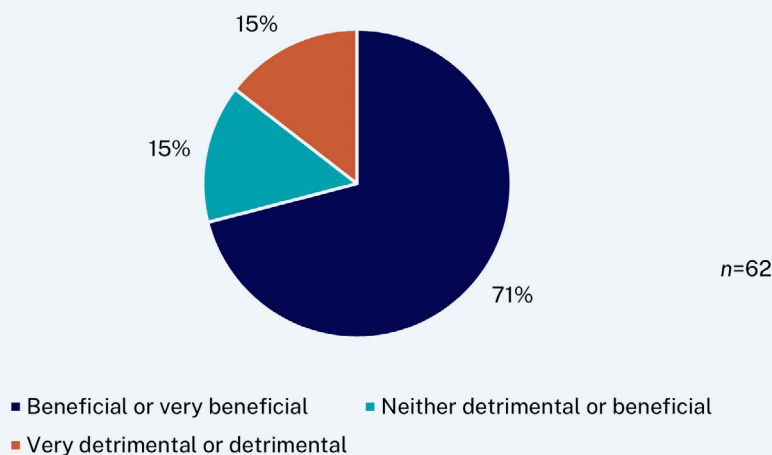
Figure 7: Respondents that are familiar with the Act rating their experiences with negotiating and entering a lease contract¹⁴



Effective lease negotiation is at the core of good leasing practices. Poor lease negotiation and lease execution practices can lead to a range of harmful outcomes for both lessees and lessors. These include parties agreeing to lease terms that are not properly understood, and misunderstandings around outgoing expenses that lead to poor financial outcomes. Poor lease negotiation can lead to disputes and, in extreme cases, lease termination.

Survey results, shown in **Figure 8**, indicate that most respondents view the provisions within the Act surrounding the pre-lease disclosure of all costs and liabilities under the lease as either beneficial or very beneficial.

Figure 8: Respondents familiar with the Act rating how beneficial the pre-lease disclosure of all costs and liabilities under the lease are in encouraging good leasing practices¹⁵



¹⁴ Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.2 for survey question.

¹⁵ Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.7 for survey question.

The Commission has identified options for improving lease negotiation, disclosure and lease execution. These include:

- The introduction of an Optional Simplified Standard Lease which incorporates best practice disclosure and is optimised for less complex lease arrangements.
- Legislative amendments to deliver improvements to the lease negotiation, disclosure and lease execution process in more complex lease arrangements where a standard lease may be unsuitable.
- The development of digital tools to support parties to a lease, and their agents, through lease negotiation, disclosure and lease execution.

The Commission proposes these options be explored further in developing a future package of reforms to support lease negotiation, disclosure and lease execution. While this report sets out broad design principles, further stakeholder consultation and analysis should be undertaken to identify appropriate features of a new disclosure and lease execution regime.

The lease negotiation, disclosure and execution process

The lease negotiation, disclosure and execution process involve multiple stages, tasks and transactions. The Act mandates minimum requirements regarding: providing a draft lease prior to negotiation; requirements to disclose certain details of the lease; guidelines for apportioning lease preparation and registration costs; and timelines for returning an executed copy of the lease.

Providing a draft lease

Section 9 of the Act states that a lessor or a person acting on behalf of a lessor must not offer, or invite an offer, to enter into a retail shop lease or indicate by written or broadcast advertisement that a retail shop is for lease, unless they have in their possession a copy of the proposed retail shop lease. The draft lease must be in written form but not necessarily include particulars of the lessee, the rent or the term of the lease.

Stakeholder feedback has advised that, in practice, lessors may have a solicitor draft the proposed lease (omitting the particulars) with the lessor or lessor's agent and then update it with the particulars once they have a prospective tenant. The lessor will then typically return to their solicitor to have the final lease drafted.

Under the current framework, the costs of preparing a lease are borne by the lessor and are unable to be directly transferred to the lessee. This is designed to protect the lessee and ensure, if after negotiations have taken place the lessee is not satisfied with the proposed terms, they are able to abandon the proposed lease without cost. However, section 14(4) of the Act requires the lessee to pay reasonable costs associated with their requested amendments to the lease.

Disclosure requirements

The Act requires lessors and lessees to disclose certain information to each other prior to the commencement of a retail lease. This occurs through a lessor and lessee disclosure statement.

The lessor's disclosure statement captures important information about the premises, the lease, and the lessees' financial obligations regarding contributions and outgoing expenses. The lessee's disclosure statement is an acknowledgement of the lessor's disclosure statement and gives the lessee the opportunity to note any statements or representations they are relying on for the lease.

The Act prescribes the form of the disclosure statement in Schedule 2 and 2A. The Act outlines requirements and timeframes for the lessor's disclosure statement in section 11 and the lessee's disclosure statement in section 11A. Key timeframes include providing the lessor's disclosure statement seven days before entering a lease and providing the lessee's disclosure statement seven days after receiving the lessor's disclosure statement.

The Act also specifies the lessee is not required to pay undisclosed contributions and undisclosed outgoings in section 12 and section 12A respectively. Sections 11(2) and (2A) provide that, if a lessee is not provided with a lessor's disclosure statement or if it is incomplete or contains information that is false or misleading, a lessee may have a statutory right to terminate the lease within the first six months. They can also recover compensation from the lessor for costs incurred in connection with entering into the lease.

Stakeholder feedback

Stakeholders report a range of complex and intersecting challenges in undertaking the lease negotiation, disclosure and execution process. These challenges relate to both the requirements of the Act and broader practices relating to disclosure and negotiation.

Costs with providing a draft lease

Some feedback to the Review suggested that the requirement to provide a draft lease at the time of advertising a lease can result in the 'doubling up' of costs and time associated with lease preparation.

Feedback noted that, in the event a lessee abandons a prospective lease, the lessor must commence the process again with the next prospective tenant, often resulting in further time and costs.

Some stakeholders report lessees currently delay returning the lessee disclosure statement to lengthen the period for requesting amendments to the lease to avoid paying the associated legal costs.

The length and complexity of disclosure statements

The lessor's disclosure statement is required to be in the form set out in Schedule 2 of the Act, and includes important details such as:

- The term of the lease and option to renew
- The rent and rent review method
- Works, fit out and refurbishment
- Outgoings and other costs
- Trading hours
- Any planned or known disruptions, such as building or shopping centre renovations, road works or demolition works.

Given the amount of information the lessor's disclosure statement is meant to contain, it can be lengthy and not all components will be relevant to every lease. This can result in many disclosure statements having pages of incomplete clauses as they are not applicable. For example, Part 9 contains shopping centre details. For retail leases that are not within a shopping centre, this section would not be relevant. The complexities of the disclosure statement often result in lessees and non-professional lessors having difficulty understanding what is required.

The core purpose of the lessor's disclosure statement is the disclosure of outgoings charges under the lease so that a lessee can assess affordability prior to entering the lease. Outgoings are property-related costs that can be transferred to the lessee for cost recovery. Feedback received suggested some experienced lessors may intentionally use disclosure statements to confuse lessees about the extent of the outgoings or the terms of the lease.

An imbalance of consequences

Stakeholder feedback has indicated an imbalance of consequences within the disclosure statement process. Section 12A of the Act states a lessee is not liable to pay any amount to the lessor in respect of any outgoings unless the liability to pay the amount was disclosed in the lessor's disclosure statement. Therefore, if a lessor makes a mistake and does not disclose a particular outgoing within the disclosure statement, the cost of that outgoing cannot be recovered.

There may also be consequences if the lessor does not follow the correct procedures with respect to disclosure statements, including conferring a right to the lessee to terminate the lease in the first six months.

However, there are few equivalent consequences for lessees during the disclosure process, such as when they fail to return the lessee's disclosure statement in accordance with the timeframe in section 11A of the Act.

Lack of compliance with process requirements

Section 11A of the Act requires the lessee to provide the lessor with the lessee's disclosure statement within seven days of receiving the lessor's disclosure statement. Stakeholders reported that, in some instances, lessees are either not returning or delaying the return of the lessee's disclosure statement. In these circumstances, leases are being entered into without satisfying the requirements of the Act.

By not returning the lessee's disclosure statement prior to entering the lease, there is an increased risk for the lessor because the lessee has not signed off on their disclosure, including outgoings. It also creates risk for lessees as they have not outlined any statements or representations that they are relying on prior to entering the lease and therefore may not be able to rely on them in the future.

Disclosure timeframes not meeting the needs of each party

Stakeholder feedback suggests the disclosure timeframes are not meeting the needs of parties in some circumstances. It is suggested there are often instances where a lessee is wanting to enter a lease quickly and the current timeframes under the Act restrict this. Stakeholder feedback also suggests industry practice in some market segments includes disclosure statements being provided after the negotiations on key terms have taken place. Therefore, if negotiations are lengthy and time consuming, the lessee has to receive the disclosure statement from the lessor and wait the required seven days before entering the lease. There may also be instances where there are further delays in the process, extending the timeline even further for the parties.

Cohesion between disclosure statement and the lease

Under the current framework, the lease and disclosure statements are separate documents, often resulting in the duplication and repetition of information. Having separate documents also creates room for mistakes, and can be inefficient and confusing for lessors and lessees. Inconsistencies between the lease and disclosure statements can give rise to disputes.

Administrative burden and compliance costs

There is some level of administrative burden and compliance cost associated with disclosure statements, though this may vary depending on the nature of the parties and the lease.

While the Commission is unaware of any specific cost estimates associated with the preparation of disclosure statements in NSW, previous impact analysis prepared in relation to the Victorian Retail Leases Act 2003 was based on the following estimates:

- 0.9 staff hours for non-shopping centre lessors
- 1.8 staff hours for lessees
- Fees of \$579 incurred to external parties (this would be \$713 if adjusted for inflation).¹⁶

While requirements under Victorian retail leasing legislation have some differences to those in NSW, disclosure requirements are similar and compliance costs are likely to be of a similar magnitude. This notwithstanding, the Commission acknowledges the Victorian estimates offer a guide only.

Legal expertise and compliant leases

Some stakeholders report that, due to complexities in the Act, there can be instances of lawyers using non-compliant leases. Retail leasing is a specialist area of the law and advisors who have limited experience or knowledge of the Act may inadvertently overlook specific requirements of the Act.

There are also instances of smaller lessees not choosing to engage legal advice. This can lead to smaller lessors and/or lessees not fully exercising or understanding their rights.

Lessor and lessee knowledge and expertise

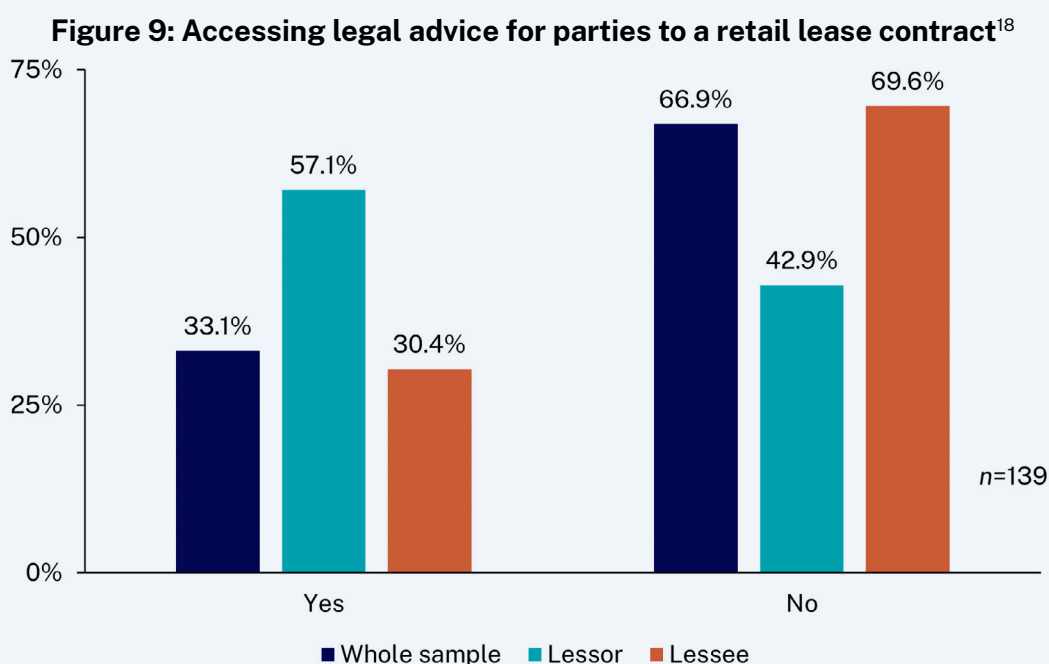
Stakeholder feedback indicates there can be considerable gaps in parties' knowledge and expertise in terms of their requirements under the Act. Educational interventions have included the Retail Tenancy Guide¹⁷, which is designed to help both lessors and lessees successfully negotiate and manage positive outcomes in relation to retail leases.

16 Department of Business and Innovation (Vic), Retail Leases Regulations – Regulatory Impact Statement (February 2013). Available at: [Retail Leases Regulations 2013](#) The Commission has adjusted the original estimate of \$579 to update it to 2023 dollars using the Consumer Price Index.

17 See: Small Business Commissioner (NSW), NSW Retail Tenancy Guide (2022). Available at: [Retail Tenancy Guide 2022](#)

The Retail Tenancy Guide provides information about starting a lease, leasing costs, lease management, and lease expiry. While the information in the guide is generally regarded as helpful, some stakeholders commented the guide does not meet all needs. In particular, some feedback noted that there may be a role for shorter and more targeted guidance for users who are unfamiliar with retail leasing and some of the main pitfalls that often give rise to disputes. While there is a role for a more comprehensive guide, stakeholders commented that some users may only consult guidance material when an issue arises.

Feedback also indicates that, in many lease negotiations, neither party is obtaining independent legal and financial advice and that they may agree to terms which may not be in their best interests. While it is clear that a significant portion of all parties are not accessing legal advice, the below chart shows that lessees are accessing legal advice at a lower rate than lessors.



Standard leases

Some feedback to the Review proposed the introduction of a standard lease to address some of the challenges when negotiating a lease. Stakeholders noted the benefits of a standard lease may include streamlining the negotiation process, preventing errors and mistakes in disclosure statements, and supporting parties to produce compliant leases. Greater consistency with the terms of a lease may provide parties greater confidence that the lease they are signing does not contain terms which are unfair or biased. A standard lease may assist with dispute resolution as the meaning of disputed clauses would be clear and more easily interpreted. Finally, a standard lease may also have the benefit of increasing the transparency of terms that are taken to apply to all retail leases by virtue of the Act (but that may not always be stated in lease documents).

Other feedback raised issues surrounding lease preparation costs, especially when lessees walk away from the prospective lease after the lessor paid for the draft lease to be prepared. The introduction of a standard lease may mean lessors would not have to rely on their lawyer to prepare a lease each time, potentially saving them time and money. Lessors could re-use the standard lease in the event a negotiation falls through or when a lease comes to an end. This may also improve the overall efficiency of the process as it could potentially reduce time spent on negotiation, with more focussed attention on a narrower range of terms that could vary under a standard lease, such as the amount of rent payable.

If a standard lease is utilised, it could enable lessors and lessees to enter the lease quicker. For parties who experience a language barrier, the use of a standard lease may enable the provision of translated versions and other explanatory and educational materials to accompany the lease.

¹⁸ Source: NSW Small Business Commission Momentum Survey, April 2023. See Appendix A, 3.1 for survey question.

While the Commission acknowledges the potential benefits of a standard lease, there are some practical questions regarding how such a proposed standard lease could be implemented. These include whether it would be compulsory or optional, whether it could be amended with additional terms added, and how to address circumstances where the standard lease is not appropriate for the circumstances and needs of the parties.

The Commission notes there are base leases used in NSW, such as the lease provided by the NSW Law Society and the Real Estate Institute of NSW. Some feedback to the Review suggested these base leases reduce the need for a standard lease product.

The Commission is of the view there is merit in exploring options to develop and implement a standard lease, including through consultation, co-design and further testing with the retail leasing industry. This could build on earlier efforts explored by industry stakeholders to develop a NSW approved retail lease.

An Optional Simplified Standard Lease

The purpose of a standard lease arrangement should be to reduce complexity, facilitate more efficient leasing arrangements, and make it easier for parties to know their rights and obligations before they commit to entering a lease.

An Optional Simplified Standard Lease is a proposed implementation model for a standard lease arrangement. While further work is needed to identify suitable lease terms and to develop the lease, the model provides a framework to introduce a standard lease as part of the Act. The model comprises the following key elements:

- **Choice:** The standard lease would be optional. Parties to a lease would remain free to pursue their own bespoke leasing arrangements to meet their existing or future needs. Parties would have the opportunity to decide whether the standard lease is appropriate to their needs during the negotiation stage.
- **Simple and standardised:** The standard lease would be drafted to contain terms which meet the needs of most lessors and lessees. To reduce complexity, only the parameters of the standard lease could be amended (such as the lease term or base rent). To ensure the lease is standardised and consistent, parties would not be able to add additional terms and obligations under the lease. (However, parties would remain free to utilise the standard lease as the basis for bespoke leasing arrangements that add additional terms).
- **Efficient:** The standard lease would be drafted to avoid terms that could create confusion and have a propensity to give rise to disputes. The standard lease would be freely available, with the lease to be prescribed as a schedule to the Act.
- **Simplified disclosure:** Parties opting into the Optional Simplified Standard Lease would be excluded from certain obligations relating to disclosure, with the standard lease containing elements of what is currently included in disclosure statements.

As noted above, choice is a key feature of the Optional Simplified Standard Lease model. A key incentive for parties to opt into a standard lease is to benefit from simplified disclosure and greater standardisation. Further policy development is required to assess which aspects of the current disclosure framework would no longer be necessary for parties opting into a standard lease.

The need for more comprehensive disclosure arrangements may be mitigated by adopting standardised lease arrangements.

Under the Optional Simplified Standard Lease model, it is expected many parties would continue to use bespoke leasing arrangements to better meet their unique needs. This includes where parties agree to terms which amend or include additional terms within the standard lease. In these circumstances, the broader disclosure obligations of the Act would continue to apply.

The Commission proposes the establishment of a process, including consultation and codesign, to undertake further policy development regarding an Optional Simplified Standard Lease.

Recommendation 8 – Optional Simplified Standard Lease

Undertake further policy development, consultation and codesign to refine and develop key features of a standard lease under the Optional Simplified Standard Lease model.

Improving disclosure arrangements

The Commission considered the lease negotiation process and stakeholder feedback to identify current challenges that could be addressed through discrete legislative amendments to improve existing disclosure arrangements. These amendments are intended to apply to all leases. However, under the Optional Simplified Standard Lease model, it is envisaged that parties would be exempted from certain disclosure requirements if they use a standard lease (subject to further policy development).

Disclosure timeframes

Consultation feedback indicates disclosure timeframes often do not meet the needs of either party. As stated earlier in this Review, lessees must be provided with the lessor's disclosure statement at least seven days prior to entering a lease. The lessee's disclosure statement is required to be provided to the lessor no later than seven days after the lessor's disclosure statement has been provided to the lessee. The Act allows the parties to extend the timeframe for the return of the lessee's disclosure statement by agreement. While the Act does not require the lessee's disclosure statement be provided to the lessor before the lease has commenced, parties are reluctant to commence the lease before the pre-lease disclosure process has concluded. Stakeholders advised there can be instances where a lessee would like to enter a lease quickly, however current timeframes prevent this from occurring.

While the timeframe for the lessor's disclosure statement may be frustrating in some cases, the requirements are an important safeguard. The purpose of the minimum seven-day period is to ensure lessees have sufficient time to understand the lease's conditions and financial obligations.

Stakeholder feedback suggests some of the frustration may be occurring as lessors and lessees are negotiating the conditions and requirements of the lease, and then completing the disclosure statement process in a transactional manner with minimal engagement. Therefore, disclosure statement requirements may be perceived to be unnecessarily prolonging lengthy negotiation.

Some feedback to the Review recommended reducing the timeframe for the lessor's disclosure to three days before entering the lease. However, on review of other Australian jurisdictions, the Commission identified the minimum timeframe for providing a lessor's disclosure statement is seven days, with some jurisdictions utilising a fourteen-day requirement.

An alternative approach is introducing a waiver notice that reduces the timeframe for the disclosure statement, provided certain requirements are met. This approach is currently utilised in Queensland, the Northern Territory and the Australian Capital Territory.

The Queensland legislation, for example, provides that the lessor's disclosure statement must be provided to the tenant (together with a copy of the draft lease) at least seven days prior to a new retail shop lease being entered into. To comply, the lessee needs to undertake the following prior to entering the lease:

- The lessor gives the lessee the disclosure statement, and
- The lessee gives the lessor a waiver notice and a legal advice report to satisfy understanding of the legal meaning and effect of the waiver.

Broader feedback indicated that often lessees are not seeking appropriate legal advice and are not well-informed when entering retail leases. Disclosure timeframes are therefore an important safeguard which ensures adequate time to properly consider the lease and to do so without being pressured.

The Commission recommends maintaining the minimum seven-day timeframe for the provision of the lessor's disclosure statement before entering the lease. However, the Commission acknowledges current timeframes can be an unnecessary barrier, particularly for lessees who have obtained legal advice and are already well-informed as to their rights and obligations under the lease.

To address this, the Commission recommends introducing waiver notices to reduce timeframes where both parties consent and have engaged a legal practitioner.

Recommendation 9 – Waiver from 7-day timeframe

Maintain the 7-day timeframe for providing the lessor’s disclosure statement as per section 11 of the Act and amend to add a provision providing an option of a waiver where the lessor and lessee have each engaged a legal practitioner.

Addressing non-return of lessee disclosure statements

The Commission’s view of best practice is that a lease should only be entered into when the lessee has provided their disclosure statement. However, feedback suggests leases are sometimes being entered into without the lessee disclosure statement and, therefore, before the pre-lease disclosure requirements are completed.

Lessees have an incentive to return their disclosure statements before the commencement of the lease. Failure to do so risks waiving the right to record any statements or representations relied on to enter a lease. This may have implications if there is a need to demonstrate a claim for reliance on a misrepresentation.

However, requiring the return of a lessee disclosure statement or enforcing penalties for the non-return of a disclosure statement is likely to increase the burden of entering a lease for lessor and lessee. Penalising lessees is arguably a disproportionate response and may not address circumstances where lessees are unaware of their obligations. Equally, voiding a lease if a lessee disclosure statement has not been returned may partially shift consequences to the lessor.

Rather than introducing new penalties or requirement, non-legislative tools and mechanisms may be effective in assisting lessees to meet their disclosure obligations. These tools and mechanism are discussed in subsequent recommendations.

Length and complexity of the lessor’s disclosure statement

Stakeholders commented on the complexity, length and duplication of information required by the lessor’s disclosure statement.

In 2011, NSW implemented the core model of the Council of Australian Governments (COAG)-led interjurisdictional harmonisation effort to deliver harmonised retail disclosure statements across the states and territories. Schedule 2 of the Act prescribes the form of the disclosure statement which is a single document containing two parts:

- Part A is the lessor’s disclosure statement
- Part B contains the lessee’s disclosure statement.

The Act also provides a separate disclosure statement for the assignment of a lease in Schedule 2A.

The lessor’s disclosure statement accounts for the substantive portion and contains thirteen parts with over 34 clauses. A user-friendly version of the current form is available on the Commission’s website but remains lengthy at 19 pages. There are no options to delete sections that are not relevant to a particular lease agreement or bypass clauses if they are not applicable.

Further, a comprehensive and detailed account of all costs and known risks under the lease agreement are to be disclosed. Where percentages of aggregated costs for a building are apportioned, formulas are required to demonstrate how the costs were calculated. Duplication of information required in the lease, disclosure statement, and summary of ‘key disclosed items’ is likely to increase the risk of errors.

The Commission proposes no substantial alterations to the contents of the prescribed disclosure statement in Schedule 2 of the Act. However, the Commission has examined the current disclosure statement and has considered options to address the issues raised by stakeholders. This includes adapting the model adopted in Victoria which provides more tailored disclosure statements for:

- Non-shopping centre retail premises
- Shopping centre retail premises
- Sub-leases under a Crown lease or a head lease.

The Commission intends to develop three distinct disclosure statements effectively filtering out disclosure requirements that are not relevant to the particular lease type, making each disclosure statement more relevant, concise and easier to understand. Having three disclosure statements relevant to the specific lease will also assist in ensuring a focus on relevant information and may also improve engagement with specific requirements and details of disclosure statements.

Recommendation 10– Tailored disclosure statements

Adapt the disclosure model to provide tailored disclosure statements for non-shopping centre retail premises, shopping centre retail premises, and sub lease under a Crown lease or head lease. This can be affected by legislative amendment to move Schedule 2 to the Regulation and the consideration of a regulation making power to allow for streamlined review.

Failure to disclose

Some stakeholders advocated for reform to the Act to include consequences or penalties for lessors that fail to disclose all agreed leasing terms and conditions on the lease. This includes rent-free fit out periods, fit out deeds, and other terms and conditions included in a side letter.

These types of outgoings are usually in the form of incentives or benefits provided to the lessee by the lessor. While there is provision to disclose these items in the lessor’s disclosure statement, they are often contained in deeds or agreements separate to the lease. While the Commission acknowledges such arrangements could impact a lessee’s ability to exercise their rights, the Commission is unaware of detrimental consequences that cannot be addressed by the Act’s existing remedies.

Section 11A of the Act provides lessees with the opportunity to note any pre-lease representations made by the lessor (or lessor’s agent) in the lessee’s disclosure statement that were relied on when deciding to enter into the lease. While some stakeholders contend a lessee who has not taken the opportunity to note any pre-lease representations in the lessee’s disclosure statement has effectively waived their rights, there are alternative remedies available in the Act and in the common law:

- Section 11(6) of the Act allows the parties to amend the lessor’s disclosure statement by agreement before or after the lease is entered into.
- Section 72AB gives the Tribunal the power to order the rectification of a lease or lessor’s disclosure statement if satisfied that an order is necessary in the following circumstances: to correct an error or omission; or to give effect to the intention of the parties when the lease was entered into; or to give effect to the actual disclosure of information between the parties.
- The terms of a ‘side deal’ or deed may be able to be enforced as a contractual agreement in a civil court.

Prescribing a mandatory fact sheet under section 9 of the Act

Some feedback to this Review suggested prescribing the Retail Tenancy Guide under section 9(1)(b)(ii)c, meaning a copy of the guide would need to be provided alongside the copy of the proposed lease.

The purpose and function of the Retail Tenancy Guide is to provide an overview of retail leasing arrangements, including requirements under the Act and tips to promote good leasing outcomes. Feedback to the Commission suggests the guide is regarded as a useful document for those seeking to learn more about retail leasing.

There is merit in supporting lessees to be informed about retail leasing and their future obligations. While the Retail Tenancy Guide is a useful resource, it may not capture the attention of all lessees, such as those who are comfortable entering a retail lease without knowing how they differ from other lease types (for example residential or commercial leases).

As an alternative, the Commission recommends the creation of a ‘before you lease’ factsheet to be prescribed under section 9(1)(b)(ii), encouraging lessees to refer to the Retail Tenancy Guide for more information about retail leasing arrangements. The factsheet will contain the most crucial information for lessees to ensure they have a foundational understanding of their rights, obligations and risks.

The fact sheet should be short, easy to provide by lessors (including through digital versions) and focussed on the most important information that will support lessees. The purpose of the fact sheet is not to replace the Retail Tenancy Guide, but to provide a quick reference for experienced and inexperienced parties to a lease.

Recommendation 11– ‘Before you lease’ factsheet

Develop and maintain a short and informative ‘before you lease’ factsheet to be prescribed under section 9(1)(b)(ii) with relevant links to seek further information in the current Retail Tenancy Guide.

Returning the executed lease

Section 15(1) of the Act currently specifies lessors return the executed lease within three months. However, some stakeholders reported this is often not practical, particularly if the lessee has failed to provide the landlord with proof of insurance, bank guarantees and other relevant documents. There may also be delays outside the control of the lessor or lessee, such as banks and solicitors being closed over the Christmas and new year period.

Some feedback to this Review recommended adjusting the timeframe for section 15(1) to six months. However, others recommended amending the Act to include a penalty, provided there are resources for monitoring non-compliance.

The three-month registration period only commences once the lessee has returned the lease to the lessor’s lawyer. Section 16(2)(a) also provides for an extension for delays obtaining head lessor/ mortgagee consents and (b) requirements of the *Real Property Act 1900* that are beyond the control of the lessor.

The Commission does not recommend an amendment to the three-month registration period. However, the Act could specify additional causes of delays to enable lessors to return the executed lease within the required timeframe. To address this issue, the Commission recommends amending section 16(2)(a) to allow for an extension for any delays attributed to the lessee in providing the lessor with proof of insurance, bank guarantees and other relevant documents pertaining to the lease.

Recommendation 12– Delays relating to documentation

Amend section 16(2)(a) to provide the lessee an extension for delays arising from the requirement to provide proof of insurance, bank guarantees, and other relevant documents pertaining to the lease.

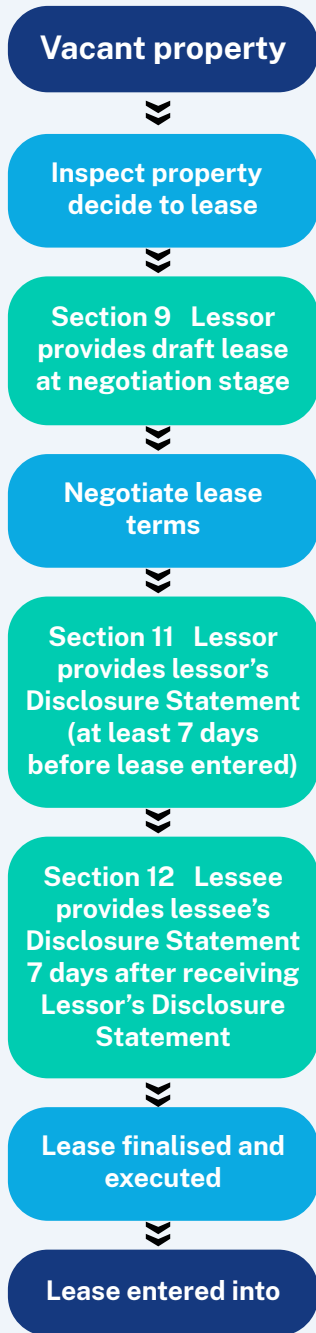
A new retail leasing disclosure framework

When taken together, the optional Simplified Standard Lease and amendments described above represent a new retail leasing disclosure framework. While the Commission has proposed various changes, there is a need for further policy development to determine the suitability of these arrangements.

A flow chart reconciling the key differences between the existing and the newly proposed disclosure regime is provided at **Figure 10** below.

Figure 10 – A new retail leasing disclosure framework

Current process



Proposed amendments



- Legislated requirements
- Proposed changes to process

Digital platform for lease negotiation

Introducing a standard lease and amending components of the Act may improve some of the challenges with the lease negotiation, disclosure and execution process. However, there are also opportunities to further improve outcomes through developing the infrastructure that supports retail leasing.

Digital solutions have the potential to redesign government requirements and regulation as services that support users to meet requirements and deliver effective outcomes. This delivers public value by reducing administrative burden and enabling more effective and transparent processes.

Developing a digital service approach

The process of negotiating, disclosing and executing a retail lease requires a complex set of information, activities and transactions, completed by a range of actors. Core to this process is the lessee and lessor who receive the costs, benefits and risks resulting from the executed lease.

At different stages of the lease negotiation, disclosure and execution process, different actors assist or complete components of the process. An agent may undertake elements of the negotiation process or disclosure process, and a legal practitioner may draft the lease and advise one party on the terms and risks of a lease.

Lessors, lessees and other actors are required to undertake lease negotiation, disclosure and execution processes according to the requirements of the Act. There are clear requirements and timeframes for disclosure and lease execution. The timeframes of the Act also function more effectively when the lease negotiation follows a specific process, such as providing disclosure at the start of the negotiation process, rather than at the end of potentially lengthy negotiations when both the lessee and lessor are keen to execute the lease.

The requirements imposed by the Act on lessors and lessees are not currently designed to support the complete process or experience from the perspective of a lessor, lessee or other actor. Given a lease requires negotiation and exchange between two parties, no single actor is responsible for the complete process of the lease negotiation, disclosure and execution process. This lack of complete oversight may cause confusion and frustration throughout the process and can lead to non-compliance with requirements. Lessees are also more likely to have little or no professional assistance in undertaking the process, which can lead to less optimal leasing outcomes.

A digital platform has the potential to design and deliver a holistic process and experience for lessees and lessors. The digital platform can provide cohesion across the complete process of the lease negotiation, disclosure and execution process. It can also assist lessees and lessors in understanding the leasing process, especially when there is an unequal balance in professional assistance in undertaking the process.

A digital platform also complements the introduction of the Optional Simplified Standard Lease and mitigates challenges relating to: the length and complexity of disclosure statements; complying with timeframes and requirements; the cost of producing a lease; and delivery of educational supports for lessees, lessors and advisors.

Feasibility study

While it is beyond the scope of this Review to determine specific design features, the Commission proposes a feasibility study to establish a digital platform to improve user experiences with the Act. This feasibility study should align with the NSW Government 'Design Standards' for effective design and delivery practices and, where appropriate, consider how the NSW Government 'Digital Service Toolkit' could be utilised to deliver optimal outcomes.

Such a digital platform has the potential to provide an avenue to incorporate the proposed Optional Simplified Standard Lease, reminders and education interventions to support lessors and lessees.

The Commission proposes exploration of the following features as part of a feasibility study:

- Portals for both the lessor and lessee to access and complete their components of lease negotiation.
- An option to include an entry condition report when entering a lease.¹⁹ The entry condition report can also act as a digital record of the premises' conditions at point of entry and can be revisited at the end of the lease or when repairs/maintenance are required.

¹⁹ Entry condition reports are considered best leasing practice but are not a legislated requirement.

- Tools to support parties to implement the Optional Simplified Standard Lease and/or disclosure documents. Tools can include collapsible fields that can omit irrelevant information in order to improve the readability of the lease and disclosure statement.
- Integrated timeframes to ensure the lessee and lessor meet their timeframe requirements. This feature will assist lease negotiation processes, especially where one party has chosen not to engage legal representation and is relying on advice from the other party's legal representation.
- A leasing calculator to demonstrate the total cost of the lease, once rent and outgoings are calculated, to ensure the financial obligations of the lease are understood.
- Features to assist lessees to understand their obligations such as providing lessors with proof of insurance, bank guarantees, and other relevant documents pertaining to the lease.
- An avenue to provide the executed lease.
- A summary of key dates under the lease, such as dates for actioning options for renewal under the lease.
- Integrated educational components that explain the purpose of the lease clauses. This could include general advice about potential risks of the clauses, and prompts for the lessee or lessor to consider legal advice to better understand risks.
- Translation features and measures to improve functional accessibility.
- Integration with bond lodgement with Retail Bonds Online (RBO).

The digital platform does not intend to replace the need for lessors and lessees to obtain legal advice. Rather, it aims to assist the process of lease negotiation, disclosure and execution by: simplifying key process challenges; improving the clarity and relevance of leases and disclosure statements; highlighting the financial obligations of the lease; and integrating educational support into the lease negotiation process.

On review, the Commission cannot identify any current lease negotiation digital solutions.

Recommendation 13 – Feasibility study for the development of a digital platform

Initiate a feasibility study on the development of a digital platform to support lease negotiations and ongoing management of a retail lease. This feasibility study should align with relevant NSW Government requirements, such as the NSW Government 'Design Standards' for effective design and delivery practices for customer-focussed services.

Part VI – Safeguards of the Act

The Act provides safeguards for both parties to the lease. It strives to provide a balance between lessor and lessee rights and obligations. It also enables leasing conditions to be determined through negotiation and market requirements.

Stakeholders provided a broad range of feedback relating to the safeguards of the Act. In some cases, this feedback indicates there was an opportunity to clarify the mechanisms and processes that facilitate minimum safeguards.

Other feedback proposed increasing the prescriptive protections for lessees or lessors in the Act. However, the Commission considers it is appropriate for the Act to continue to provide flexibility for lessors and lessees to negotiate terms that are appropriate for both parties, rather than introducing prescriptive protections.

Improving mechanisms and processes

Stakeholder feedback demonstrated opportunities to clarify some mechanisms and processes in the Act.

Advertising the availability of a retail shop before the end of a lease

Section 44A of the Act prohibits lessors from advertising the availability of a retail shop or inviting tenders or expressions of interest during the term of a lease, except under very specific circumstances. Circumstances where a retail shop can be advertised before the end of a lease include if the lessee has not accepted a lease renewal or extension, the lessor has informed the lessee of their intention not to renew the lease, or the lessee has consented.

Review feedback proposed removing this prohibition as it is unfairly detrimental to lessors that have reasonable commercial reasons to relet their premise and ensure continuity of occupation. Feedback indicates that advertising a lease may also be part of the market testing process which could be used to inform whether to extend or renew an existing lease.

It appears some lessors are managing their commercial interests by notifying lessees of their intention not to renew a lease under 44A1(b). Once the retail shop has been advertised, the lessor then enters a new lease with the original lessee. This practice may be problematic where it provides lessees with a false indication of the lessor's intentions, particularly where the lessor may be open to expressions of interest from the lessee (including to renew or extend the lease).

The Commission proposes an amendment to section 44A1(b) to allow a lessor to advertise the availability of a retail shop, provided they give written notice to the lessee and invite the lessee to make an offer or express their interest to re-lease the property. If there are arrangements for the lessee to remain in the retail shop (such as a lease option), then existing requirements should continue to apply.

The Commission assesses that proposing stronger restrictions on the advertising of a retail shop may impact the legitimate commercial interests of lessors.

Recommendation 14– Restrictions on advertising property

Amend section 44A1(b) to clarify that if a lessor provides written notice to a lessee, a lessor can advertise the availability of a shop for lease while also inviting the existing lessee to make an offer or express their interest. Maintain restrictions for existing occupancy arrangements.

Electronic Lodgement Network Operator costs

Currently, the Act requires the lessor to pay the lease preparation expenses and for the lessee to pay for the cost of registering the lease. Section 14 prohibits lessors from charging lease preparation expenses to the lessee, with 'lease preparation expenses' defined to exclude registration fees under the *Real Property Act 1990*.

However, Electronic Lodgement Network Operator (ELNO) costs for the electronic registration of the lease are not specified in section 3 or the corresponding *Real Property Act 1990*.

Some stakeholders recommend excluding ELNO costs from the definition of lease preparation expenses in section 3 to enable the lessor to recover these costs from the lessee. This proposal is consistent with the principle that lessees incur the costs of lease registration.

Recommendation 15– ELNO costs

Amend the definition of ‘lease preparation expenses’ under section 3 of the Act to exclude Electronic Lodgement Network Operator costs.

Lodgement of bonds

Lessors typically ask for some form of security when negotiating a lease. If the lessee agrees to give the lessor a cash bond as security, the lessor must deposit the bond with NSW Fair Trading within 20 business days of receiving it as per section 16C(2). Some stakeholders recommend reducing this timeframe to seven days, as 20 days is unnecessarily lengthy.

However, the 20 business days timeframe allows for the postage of cheques which is the predominate method of retail bond lodgement. Current industry practice involves either the lessee or lessor lodging the bond. In the case the lessee lodges the bond, the lessee provides the receipt to the lessor.

The online lodgement of bonds is available to lessors and agents by registering with RBO digital platform, but this is not currently used by most lessors or agents for retail bonds.

To encourage greater uptake of the RBO digital platform and reduce the time required to submit the bond, lessors and agents could be required to access the bond lodgement forms by registering with the RBO digital platform. Options to submit the bond would continue to include by post or online. However, based on the uptake of the RBO lodgement, there is the potential to reduce the timeframe for lodging a bond in future.

This approach mirrors the process currently used for bonds for residential leases.

In addition, the Commission has written to NSW Fair Trading regarding proposed amendments to the bond claim process which could be made clearer to lessees if the recommendations made by the Commission were adopted.

Recommendation 16– Lodgement of bonds

Consider a preliminary process change to require lessors and/or agents to register in RBO to access lodgement forms. Based on the uptake of RBO lodgement, there may be the option to reduce the timeframe for bond lodgement in the future.

Increases and transparency in outgoing expenditure

Concerns were raised about significant increases in outgoings where a lessor changes service providers. Some stakeholders perceive this as a strategy for lessors to indirectly increase their financial benefit from the lease outside of the appropriate processes. For example, stakeholders were concerned lessors may change to more costly providers as an indirect way of increasing rent, particularly in shopping centres.

Section 28 of the Act contains a provision regarding outgoings statements for leases within shopping centres. This provision currently must include a breakdown of management fees paid in respect of the centre, a breakdown of cleaning costs paid by the lessor, and any other particulars prescribed by the regulations. However, the Commission observes there may be a need for greater transparency of outgoings in shopping centre retail leases.

Another concern relates to the transparency and accountability of marketing funds. Shopping centres sometimes maintain marketing funds (made up of compulsory contributions from lessees) for the lessor to spend. Lessees sometimes view these marketing levies as 'extra rent' payable with no return on investment and believe they are better placed to market their own businesses.

While the Act requires lessors account for marketing expenditure and for the provision of marketing calendars, there is no requirement to assess the effectiveness of marketing campaigns.

The Commission recommends monitoring the effectiveness of marketing expenditure and adding a provision into section 28(1)(b1) to capture the additional outgoings raised by stakeholders. This amendment would require the outgoings statement in shopping centre retail leases to include a statement of total fees paid, broken down into component costs.

Recommendation 17– Increase in outgoing expenditure

Amend section 28(1)(b1) to address stakeholder concerns regarding lack of transparency in outgoings for leases within shopping centres. The amendment can specify the component cost of outgoings including services such as security and sanitation. Additionally, monitor any issues in relation to the effectiveness of marketing expenditure.

Audit of outgoing expenditure

Section 28 of the Act refers to outgoing statements and includes a requirement for the outgoings statement to be accompanied by an auditor's report on the statement prepared by a registered company auditor. Stakeholders advised that lessees find this requirement confusing and often do not ask for this from the lessor.

The Commission notes it may be useful to adjust the requirement for retail leases based on location. For retail leases outside of a shopping centre, the report can be prepared by a Certified Public Accountant, while retail leases within shopping centres will maintain the registered company auditor requirement.

Recommendation 18– Audit of outgoings expenditure

Adjust the requirement in section 28 so that outgoings statement for retail leases outside of a shopping centre can be prepared by a Certified Public Accountant, while retail leases within shopping centres will maintain the registered company auditor requirement.

Capital costs recovery

Section 23 of the Act provides that a provision in a retail shop lease is void to the extent that it requires the lessee to pay any amount in respect of the capital costs of the building in which the retail shop is located, or any building in the retail shopping centre or any areas used in association with any such building. Similarly, section 24 of the Act further states that a provision in a retail shop lease is void to the extent that it requires the lessee to pay any amount in respect of depreciation.

These restrictions, as well as broader restrictions on collecting outgoings, have the potential to complicate arrangements which seek to share the cost of energy efficient upgrades between the lessee and lessor as shared beneficiaries of any capital investments or upgrades.

The Commission's view is the prohibition on provisions in leases that allow lessors to recover capital costs from lessees should not prevent parties from mutually agreeing to arrangements aimed at facilitating commercial or related benefits to both parties, including energy efficiency.

Another issue raised was that agents may have a lack of knowledge regarding what capital costs involve when calculating lessee outgoings contributions. 'Capital costs' are not defined in the Act; however, there are external materials that may provide guidance to parties, such as factsheets published by the Australian Taxation Office.

Recommendation 19– Capital cost recovery

Amend section 23 to allow for parties to mutually agree on cost recovery arrangements where both parties are a shared beneficiary (such as upgrades to improve energy efficiency). Additionally, the Commission recommends the inclusion of a definition of ‘capital costs’ within the Act.

Pharmacies and turnover rent

The consultation raised specific feedback regarding pharmacies and the practice of turnover rent. Pharmacies are regulated by the *Health Practitioner Regulation (Adoption of National Law) Act 2009* (HPRA), which voids the charging of turnover rent in pharmacies as pharmaceuticals can have high cost but little or no profits. Subsection 10(1)(d) of Schedule 5F of the HPRA states that a provision in a lease that provides that the lessor is to receive consideration that varies according to the profits of the business is void. Therefore, lessors charging pharmacies percentage rent or turnover rent is unlawful under the HPRA.

Turnover data for pharmacies is often skewed by high price pharmaceuticals with minimal margin. This results in lessors having a false impression of increasing turnover where there is an increase in pharmaceutical supply. As turnover rent is permissible under the Act in a general sense, standard lease forms may contain clauses pertaining to turnover rent which are then often being used for pharmacies entering a retail lease.

Turnover from pharmaceutical-related sales should be excluded from turnover rent in section 20 to ensure consistency with the HPRA and greater clarity.

Recommendation 20– Pharmacies and turnover rent

Update section 20 to clarify that pharmaceutical-related sales should be excluded from turnover rent.

Non-disclosure of information in valuation

Section 31(4) of the Act restricts the disclosure of valuation information by Specialist Retail Valuers in any way that discloses information identifying ‘other leases or parties to other leases or relating to the business of parties to other leases’.

Stakeholders advise this restriction is less necessary when there is the appointment of Specialist Retail Valuers in strip retail, as stakeholders perceive that confidentiality is not as essential in strip retail as it is between shopping centre owners and their lessees.

These stakeholders consider there would be benefits to enabling valuers to not apply this restriction to strip retail or where the lease information is available publicly, such as through a registered lease.

The Commission recognises, while there may be some benefits from this change, there may also be broader and unintended outcomes for different types of lessee and lessor relationships. There would be benefits to more clearly understanding this issue before undertaking any legislative amendments.

Recommendation 21– Non-disclosure of information in valuation

Undertake further consultation to consider an update to section 31(4) to allow for the disclosure of valuation information in strip malls and standalone premises, with clear exclusions for shopping centres.

Notices for non-payment of rent prior to terminating the lease

A lessee has an express obligation under a lease to pay the full amount of rent when it is due. While a lease may contain a right of re-entry provision requiring a lessor to provide notice of an intent to terminate the lease for non-payment of rent, some leases contain an alternative provision allowing a lessor to re-enter and terminate *without* notice. A lessor may nonetheless be able to end the lease without notice if the lease is silent and does not contain a right of re-entry provision. This is due to a right to terminate after a lessee has been in arrears for one month implied into every lease by section 85(1)(d) of the *Conveyancing Act 1919*. Where a lease contains a notice requirement, stakeholders argue that lessees should be able to rely on the notice before any action is taken by the lessor. A lessor risks liability for unlawful entry and damages if the action taken does not comply with the law.

The law relating to the termination right of lessors for the non-payment of rent by lessees is complex. Stakeholders have expressed various interpretations of the effect of section 129 on right of re-entry provisions and recent case law on the subject.²⁰ Section 74(2) of the *Conveyancing Act 1919* allows parties to a lease to vary the right of re-entry implied by section 85(1)(d) by the terms of their agreement. Therefore, if a lease contains a provision requiring the lessor to give notice before exercising a right of re-entry, a lessor will be required to provide notice and will not be able to rely on the implied right to terminate without notice. Stakeholders have incorrectly assumed that a lessor can rely on section 85 to 'invalidate' a notice requirement in a lease. Section 129(8) of the *Conveyancing Act 1919* affirms section 129 does not impose a statutory notice requirement for termination of a lease for non-payment of rent.

The Commission has considered an amendment to the Act to limit the effect of section 85 of the *Conveyancing Act 1919* where a lease is silent and does not contain a right of re-entry provision, and to clarify that a notice of intent to terminate for non-payment of rent is required. However, the Commission notes stakeholder feedback in relation to considerable gaps in parties' knowledge and expertise in terms their obligations under the Act.

The Commission suggests the proposed 'Simplified Optional Standard Lease' can include a right of re-entry provision to provide clarity for both the lessee and lessor that a notice is required.

Clarifying notice of intention at end of lease

Section 44 of the Act specifies requirements for a lessor to notify the lessee of their intentions at the end of lease. The Act requires the lessor provide a notice not less than 6 months and not more than 12 months before the expiry of the lease in relation to whether or not the lessor intends to offer the lessee an extension or renewal of the lease.

Feedback indicates there is some confusion about whether this should occur at the end of the lease (if there are no options) or at end of the final lease extension or option period. The Act is silent on the operation of lease extension requirements. The Commission recommends the Act is amended to clarify the requirement applies at the end of the option period (if one applies).

Recommendation 22– Notices of intention at end of lease

Progress an amendment to section 44 of the Act to clarify that the notice to the lessee, of the lessor's intention at end of lease, is required not less than 6 months and not more than 12 months before the expiry of:

- The lease term (if there are no options), or
- The lease extension or option period.

Financial capacity for lease assignment

Lessors can withhold consent for the assignment of the lease according to the grounds specified in section 39. Section 39(1)(b) specifies a lessor is entitled to withhold consent to the assignment of a retail shop lease 'if the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor'.

However, the Act does not specify whether these resources or skills are assessed at the time the lessee entered the lease, or at the time the lessee is seeking to assign the lease. Given it is possible the lessee's resources or skills have changed during the term of the lease, some feedback to the Review recommended clarifying this clause.

A review of other jurisdictions identifies that Victoria, the Australian Capital Territory and the Northern Territory define 'sufficient financial resources or business experience' as what is satisfactory to meet the obligations under the lease, rather than comparing the financial resources or business experience to the existing lessee. The Commission recommends the Act adopts this approach to the lessor's assessment of the proposed assignee of the lease. Further consultation to inform policy development is required to establish the minimum standards of assessment of 'retailing skills' and 'financial resources' of the proposed assignee.

²⁰ Charlie Bridge Street Pty Ltd v Petrazzuolo BC201900622; Petrazzuolo v Charlie Bridge Street Pty Ltd [2019] NSWCATCD 1.

Recommendation 23– Financial capacity for lease assignment

Undertake further consultation to consider an amendment to section 39(1)(b) to clarify that the proposed assignee has financial resources or retailing skills sufficient to meet the obligations under the lease.

Permitted use of lease and lease assignment

Some stakeholders reported the practice of including a retail shop's trading name as the permitted use of the lease. This significantly reduces a lessee's ability to alter the use of their retail shop as they may be unable to trade under a different name or seek to assign their lease to a new party.

Section 39 specifies the grounds on which a lessee can withhold consent to a lease assignment. The intent of this section was to ensure an appropriate safeguard for lessors to manage the type of category of business that is run in their premise and support their appropriate management of tenancy mix and commercial interest.

The Commission maintains restricting a lessee's permitted use to a specific trading name arguably exceeds the intent of the Act and hinders on the lessor's ability to respond to market needs and restrictions.

The Commission recommends including a definition or clarification of 'permitted use' under section 3 or section 39 to specify a generic category of retail shop, such as the Prescribed List, rather than a specific brand or trading name, for the purpose of the lease and assignment under section 39(1)(a).

Recommendation 24–Permitted use of lease and lease assignment

Consider a definition or clarification of 'permitted use' under section 3 or section 39 to specify a generic category of retail shop, such as the Prescribed List, rather than a specific brand or trading name, for the purpose of lease and assignment under section 39(1)(a).

Cost recovery on entering a new lease as an alternative to assignment of lease

Currently, the lessor and a proposed assignee can enter a new lease as an alternative to an assignment of the existing lease. However, the lessor is prohibited from recovering lease preparation costs for a new lease under section 14(1). Sections 39(2) and 40(3) also operate to enable the lessor to recover reasonable costs for legal or other expenses incurred as part of the consent to assignment of lease.

Some feedback recommended the Act be revised to allow the lessor to recover reasonable legal and other costs incurred as part of the preparation, entry and registration of any new lease entered into by a lessor and a proposed assignee. The lease may be assigned on the same terms or on different terms. Alternatively, if the lease is assigned on different terms, the parties may agree to draft a new lease. The Commission recommends excluding lease preparation expenses following a lease assignment from section 14. This will enable the assigned lessee and lessor to execute a new lease if desired.

Recommendation 25–Cost recovery on entering a new lease as an alternative to assignment of lease

Amend section 14 of the Act to remove the prohibition to enable lessors to recover lease preparation expenses in circumstances where the existing lease could be assigned but the parties instead agree to enter a new lease.

Assignor's Disclosure Statement

Feedback suggested the assignor's disclosure statement is frequently not served on the incoming lessee. Section 41A of the Act provides protections for the assignor of a lease for an ongoing business. The assignor will be released from ongoing liability, but only if they provide an assignor's disclosure statement (along with an updated lessor's disclosure statement) to the incoming lessee at least seven days before the assignment of the lease. If the assignor fails to provide the assignor's disclosure statement, they are still liable under the lease.

The Commission notes the importance of disclosure when assigning a lease and the need for further consultation on this matter. The Commission recommends the Act be amended to allow ongoing liability of the assignor to be released so long as an updated lessor's disclosure statement has been provided to the assignee at least 7 days before the assignment of the lease. Therefore, the Act's requirement for provision of an assignor's disclosure statement is maintained. However, non-provision would no longer prevent releasing the outgoing lessee from ongoing liability if an updated lessor's disclosure statement has been provided to the assignee.

Recommendation 26– Assignor's Disclosure Statement

Amend section 41A of the Act to reflect ongoing liability of the assignor will be released, so long as an updated lessor's disclosure statement has been provided to the assignee at least seven days before the assignment of the lease.

Demolition and relocation

Some lessees perceive demolition clauses are being used for the purposes of reletting a shop to a new lessee who can pay higher rent, such as where minor renovations are undertaken to trigger a relevant clause. Section 34A specifies safeguards for relocation should there be disturbances to the lease and section 35 specifies safeguards for demolitions.

Feedback to this Review suggested extending the notification timeframe for relocations from three months to six months. However, the Commission assesses three months should provide a sufficient timeframe for lessees and lessors to manage and negotiate their retail lease.

Compensation for loss of profits and fit out in demolitions and relocations

Some stakeholders advise compensation arrangements for demolitions and relocations are insufficient and do not make up for foregone losses or profit.

The Act provides for compensation in some cases, including for relocation and demolition. Section 34A(f) specifies a lessee is entitled to the reasonable costs of relocation if a lessee is relocated to an alternative shop. If a lease is terminated due to an upcoming demolition, section 35(3A) specifies the lessor is liable to pay the lessee compensation for the fit out of the retail shop (if fit outs are a requirement under the lease).

In the event of relocation, compensation is currently available for the removal and restoration of the fit out. However, some stakeholders recommend lessees should also be compensated for the original cost of the fit out, with appropriate depreciation.

The Commission notes section 34A(f) provides for the lessee to be compensated for costs associated with restoring the fit out of their shop in the new location. This includes costs incurred by the lessee in dismantling the fit out and re-installing the fit out in the new location to the standard immediately before the relocation. In these circumstances, providing additional compensation for the original cost of the fit out would exceed what may be appropriate as a minimum requirement of the Act.

In circumstances where a lessee chooses to terminate the lease, compensation for lost 'potential' earnings may also exceed what is appropriate. If a lease contains a relocation provision, then it is arguable the lessee needs to anticipate prior to agreeing to the lease that they may be relocated. In these circumstances, any decision to terminate the lease is an action taken by the lessee rather than the lessor.

'Commercial values'

As previously noted, a decision to terminate a lease under section 34A could be viewed as an action of the lessee. Section 34A specifies the lessee's entitlements for a new lease in an alternative shop, should there be a requirement for a relocation.

Stakeholder feedback indicates section 34A does not adequately consider all the factors lessees require or the reasons they selected the original premise, should they be required to relocate. These factors can include exposure to foot traffic, the surrounding retail mix, the shape or nature of a premise, and road frontage. Some of these attributes may not be reflected as part of market valuation even if they are of commercial value to the lessee.

For example, it may be of higher commercial value for an ice cream parlour to be located in an entertainment precinct instead of a fashion precinct even if the alternative shop is of equivalent market value.

While section 34A(d) enables a lessee to terminate the lease if they do not wish to take up the alternative shop, this can be a costly decision if it impacts the continuity of business income and results in losses of goodwill. As previously discussed, under section 34A(f) lessees are entitled to payment for reasonable costs of relocation; however, this does not necessarily include any historical fit out or other costs incurred on the presumption their lease would run to term.

It may therefore be appropriate for the Act to clarify that ‘commercial values’, as described in 34A(c), takes into consideration any factors that affect the commercial value of the existing or alternative shop from the perspective of the lessee. As such, if the shop is inferior from the perspective of the lessee, then there would be a clearer basis for rent to be adjusted to take into account differences in the commercial values of the existing retail shop and the alternative shop from the perspective of the lessee.

Recommendation 27– Rent adjustment when ‘commercial values’ vary

Amend section 34A(c) of the Act to specify the appropriate consideration of commercial factors such as exposure to foot traffic, surrounding retail mix, shape or nature of a premises and road frontage.

Demolition with vacant possession

Section 35 specifies safeguards in the event of demolitions. This includes section 35(3) which provides for compensation to the lessee if the lessor has not carried out the demolition ‘within a reasonably practicable time after the termination date notified by the lessor’. This discourages lessors from claiming the lease needs to be terminated in accordance with a demolition clause without a genuine intention to conduct the demolition.

Section 35(1)(a1) further requires the demolition cannot be undertaken unless the lessor has vacant possession of the shop, meaning demolition causes cannot be relied on for superficial works.

However, the Act currently does not include a provision for compensation to the lessee in the event a lease is terminated for demolition which ultimately could have been undertaken without vacant possession of the shop (for example if the scope or scale of works were altered after the termination of the lease). Given this lack of provision for compensation, there is the potential for misuse by lessors. Potential misuse can be assessed by monitoring any emerging disputes and issues relating to situations where the lessor has not demonstrated to the lessee the criteria for triggering a demolition clause.

Recommendation 28– Demolition with vacant possession

Monitor any emerging disputes and issues relating to situations where the lessor has not demonstrated to the lessee the criteria for triggering a demolition clause as specified in section 35(1)(a1).

Regulation making power for COVID-19

Part 11 was introduced in response to some of the significant disruptions associated with the COVID-19 pandemic. Part 11 includes a regulation making power (section 87), savings of protections granted during COVID-19 pandemic (section 88), and savings and transitional regulations (section 89).

Part 11 was introduced to address issues related to the emergency phase of the pandemic, including when Public Health Orders issued under the *Public Health Act 2010* significantly restricted the activities of some lessees.

There are currently no active Public Health Orders in NSW and COVID-19 is no longer declared an international public health emergency by the World Health Organization. COVID-19 is expected to become endemic over time which raises the prospect of whether specific provisions of the kind set out in Part 11 should remain in the Act.

It is beyond the scope of this Review to assess whether a similar policy response should occur should similar circumstances arise into the future. For this reason, the Commission cannot recommend the maintenance of a more generalised regulation making power in response to future pandemics or equivalent disruptions. However, the Commission considers there is limited rationale for retaining the current regulation making power and any further interventions should be subject to the oversight of NSW Government.

The savings provisions of Part 11 are required to maintain the effect of *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and the *Conveyancing (General) Regulation 2018* as they relate to events during the time of their operation. These regulations have since been repealed and would not otherwise have effect. Sections 88 and 89 should therefore continue to apply.

Recommendation 29– Response to COVID-19

Removal of Part 11 (response to COVID-19 pandemic) from the Act (retaining relevant savings provisions).

Western Sydney International Airport

Part 9A of the Act provides for minor exemptions to accommodate certain requirements relating to aviation operations for Sydney Kingsford Smith Airport. The Act does not apply to the future Western Sydney International (Nancy-Bird Walton) Airport.

To ensure prospective retail tenants have clarity and certainty about the regulatory framework governing retail leases in Western Sydney International Airport, the Commission recommends Western Sydney International (Nancy-Bird Walton) Airport is included in Part 9A of the Act; this advice was provided to the former Minister for Small Business.

The Commission understands an amendment may be required to cater to operational differences, such as terminal configurations and definitions relating to airside premises.

Recommendation 30– Western Sydney International Airport

Extend the existing Part 9A provisions applying to Sydney (Kingsford-Smith) Airport to the future Western Sydney International (Nancy-Bird Walton) Airport.

Protections of the Act

Some stakeholders proposed amendments that would increase prescriptive protections for lessees or lessors in the Act. These suggestions included:

- Increasing transparency in the rental market
- Mandatory force majeure provisions
- Preferential rights for the current lessee when the lease ends
- Restrictions relating to turnover rent
- Turnover reporting requirements
- Increasing lessors' notification requirements.

It is arguable whether suggested amendments are of a nature which exceed the current objectives of the Act as well as those expressed in the proposed 'Objects Provision'. As discussed, the Commission recommends specifying that the Act provides minimum safeguards, mechanisms and processes to enable lessees and lessors to negotiate and manage their retail lease.

It is appropriate for the Act to continue to provide flexibility for lessors and lessees to negotiate terms that are appropriate for both parties. Rather than action legislative amendments, education can play a role in supporting lessors and lessees to understand and negotiate the terms of the lease, and negotiate terms that meet their needs. This could be supported by the proposed digital platform recommended in **Part V** which could integrate education relating to leasing protection throughout the lease negotiation, disclosure and execution process.

Increasing the transparency of the retail leasing market

Some stakeholders advocated for the Act to provide greater transparency in the retail leasing market, including through the provision of data and through providing open visibility over agreements that encompass agreements made outside of the lease. Increased transparency would enable lessees and lessors to have greater knowledge of market conditions, including rent and conditions of leases. As some larger lessors may have visibility over multiple leases, it is commonly suggested they have an information advantage regarding the rent and conditions within the retail leasing market.

Stakeholder feedback demonstrates stakeholders currently use NSW Land Registry Services (the property title register) as a source of data for market information. However, as key conditions, rent-free periods or rent reductions are often included on side deals, the Land Registry delivers imperfect market information.

Greater market transparency would be beneficial to some retail leasing industry participants. However, the Commission assesses that facilitating market transparency is beyond the scope of the Act (which relates to promoting good leasing practices). While compelling the provision of this information may support some participants in the retail leasing market, the Commission notes that incomplete information is a common reality across a range of commercial, business and property transactions.

Responsibility for previous lessee's fit out

Some stakeholders report current leasing practices can include the lessor shifting responsibility of any fit out abandoned by the previous lessee to the new lessee. Feedback suggested this is an unfair leasing term as the new lessee is unable to mitigate risks associated with the abandoned fit out, including its removal.

In signing a lease with this type of provision, a lessee effectively agrees to incurring the costs and liability for a third party removing the fit-out while the lease is ongoing. These provisions may create concerns the lessor has not taken reasonable steps to ensure the property is abandoned and unencumbered, preferring to transfer the risk to the lessee. While an incoming lessee may appear to financially gain from the fit-out (or other property), they may also assume the risk of liability for a claim by a mortgagee or other claimant with a financial interest (bank or finance company lender).

This Review considered legislative amendment to prohibit lease clauses that transfer risk or require lessors to warrant they are satisfied no other claims are likely to arise in relation to the fit-out and other property transferred to an incoming lessee. However, at this stage the Commission has not been provided with examples demonstrating the degree of risk. The Commission proposes to monitor and educate new market participants and legal practitioners (noting that a large proportion of lessees do not seek legal advice prior to executing a lease contract and few practitioners specialise in retail leasing).

Side deals

Side deals are the practice of agreeing to and providing leasing terms not recorded in a lease. Side deals can play a practical role in lease negotiations, as it may be too costly to include terms agreed late in the lease negotiation process. Common terms provided in side deals include rent free periods, discounts on the agreed rent and contributions to the fit out.

Some feedback to this Review raised challenges with how side deals are used in the market. Some noted that, in some cases, side deals are used strategically by lessors to inflate market prices and reduce transparency in the market. In addition, some stakeholders raised the legal status of side deals, including whether they provide finance to lessees in a manner unregulated by the *Australian Securities and Investments Commission Act 2001* (Cth) (for example, by effectively providing a loan to fund the fit out).

The Commission will monitor disputes to assess the extent and implications of such arrangements accommodated through side deals.

Mandatory force majeure provisions

Some stakeholders proposed mandatory force majeure provisions to provide a pathway for lessees to exit the contract due to an extraordinary disruption or unexpected event. Currently, the Act allows lessees and lessors to negotiate the inclusion of force majeure provisions.

Feedback supportive of mandatory force majeure provisions reflect experiences of lessees during the COVID-19 pandemic. While force majeure provisions may benefit lessees when triggered under the terms of a lease, they would generally redistribute the allocation of risk from lessees to lessors. Any benefits to lessees must be considered in the context of costs that would accrue to the lessor (such as their inability to earn an income and the cost of finding a new tenant).

Lessors may seek additional rent to cover the implied cost of a mandatory force majeure provision and this arrangement may not be efficient for all leasing arrangements. Under status quo arrangements, parties can negotiate and plan for an allocation of risk.

Preferential rights

Preferential rights require the current lessee to have first rights to a new lease when the lease expires. While preferential rights are not legislated in NSW, lessees and lessors can negotiate options for renewal which provide the lessee with the right to renew their lease for a specific timeframe.

In practice, preferential rights also tend to have a high number of qualifications, which can make preferential rights less effective in providing the lessee with security of tenure.²¹ Prescribing preferential rights may also disadvantage emerging retailers to the benefit of retailers that have established leases. The reduced flexibility and potential costs for lessors may also encourage lessors to provide commercial leases, rather than retail leases.

Exercising an option to renew a lease

Where a retail shop lease contains an option to renew the lease on the same terms at the end of the original period, there is usually a corresponding provision detailing timeframes for exercising this option and the method for changing the rent.

When exercising this option, it is common for provisions to require a lessee to give written notice to the lessor not less than three months and not greater than nine months before the expiry of the original term. Where an option clause in a lease provides for the rent to be changed to current market rent, the Act provides a mechanism to have the market rent determined early and extend the option exercise period, by appointing a specialist retail valuer under section 31.

In NSW, South Australia, the Australian Capital Territory and Queensland, retail tenancy legislation does not obligate a lessor to notify a lessee of the last day the lessee must exercise their option. In Victoria and Western Australia, retail tenancy laws require a lessor to provide notice no less than 6 months and not more than 12 months before the expiry of the lease term.

Feedback suggested NSW should adopt the approach of Victoria and Western Australia to ensure that lessees do not lose their right to exercise an option by failing to remember the due date. Stakeholders have also proposed that NSW legislation should require the option notice to either note the Act's mechanism for an early determination of market rent or prescribe a mandatory market rent review to determine the change of rent when an option is exercised.

Industry practice in NSW is varied and, while many managing agents and lessors do notify lessees of an option exercise deadline, many will rely on lessees to self-manage their obligations under the lease. For lessees who fail to exercise an option within the prescribed period, the option to negotiate a lease renewal with the lessor can still be pursued. Mediation assistance provided by the Registrar of Retail Tenancy disputes under section 65 of the Act is an effective mechanism to assist with this issue.

The Commission is mindful that, while providing an obligation to notify may benefit lessees, it would create additional responsibilities for the lessor. The Commission's view is the Act should foster a shared management of the lease, where both the lessor and lessee are encouraged to act in their own commercial interests rather than relying on the other party.

21 Productivity Commission (Aus), *The Market for Retail Tenancy Leases in Australia* (March 2008). Available at: [Retail Tenancy Market](#)

The proposed digital platform recommended in **Part V** may provide a superior alternative as it would provide lessors and lessees with the tools to be informed about key dates relating to the lease.

Communication method under the lease

Some stakeholders were concerned that, when email is used as the communication method under the lease, there is a risk the lessees will not receive, or will not engage with, the notice or information. These stakeholders interpret the Act as prohibiting the use of email as a communication method under the Act.

However, the Commission assesses that lessees and lessors should have the flexibility to negotiate their preferred communication method under the lease. It is likely many lessees may prefer to receive notices and other information by email, rather than post.

The Commission has confirmed the service of notices by email under a lease will not be invalidated by the *Electronic Transactions Act 2000* if a lease provision provides that notices served under the lease may be served by email. However, where a lease is silent, authorisation must be sought to communicate notices issued under the lease by email.

Feedback to this Review proposed prohibiting the service of notices under the lease by email on the basis that email delivery is unreliable. The Commission notes industry practice has evolved to favour email communications over delivery by post. While there may be risks with email, there are also methods of mitigating risks, such as the use of 'read receipts' and keeping copies of sent emails. The Commission will engage in broader education to assist with highlighting the risks of communication by email; however a legislative prohibition is not supported or proposed at this time.

Maintenance of the premises and demolition protections

Stakeholder feedback suggests there may be a lack of knowledge about the responsibilities of lessors and lessees for the maintenance of the premises.

The division of responsibilities should be agreed to during the lease negotiation stage and should be clearly outlined in the lease agreement. It is common for the lessor to be responsible for maintaining the structural components of the premises. Typically, the lessee is responsible for maintaining the property in its condition at the commencement date of the lease and undertaking any necessary repairs required to maintain the condition of the premises.

In addition, the Act currently contains notice periods and safeguards for circumstances of demolition; however, stakeholder feedback suggests some parties may be unaware of their rights and obligations in the event they are triggered. This includes understanding requirements of both the Act and the lease itself.

Advertising size of retail spaces for lease

Feedback noted there are commonly inconsistencies between advertised floor space and the actual size of the premises. Premises advertised as 'approximately' a certain size can often be significantly larger or smaller than the size advertised, with subsequent implications for both rent and outgoings.

The Commission notes the Act does not generally regulate the characteristics of advertisements relating to retail leases. Other legal protections, such as the general prohibition of misleading and deceptive conduct, can be relied on in circumstances where a party incurs detriment due to incorrect estimates of floorspace; however, whether these protections apply, and the availability of remedies, will ultimately depend on the circumstances.

The Commission does not make a recommendation in relation to the advertising of floor spaces at this time; however, the potential for misleading and deceptive conduct should be monitored.

Delivering educational support

As discussed throughout this section, there are many opportunities to support lessors and lessees through educational support. At present there are a range of information resources available to lessors and lessees, including the Retail Tenancy Guide and various help articles available on the Small Business Commission website.

The proposed pre-lease fact sheet and digital solutions should assist in improving understanding of lease conditions, including by referencing and promoting existing guidance materials like the Retail Tenancy Guide.

Recommendation 31– Education and support

Develop the pre-lease fact sheet and digital platform to complement and improve the usefulness of existing support materials. The supporting infrastructure for the Act should help improve outcomes with respect to risks and awareness of:

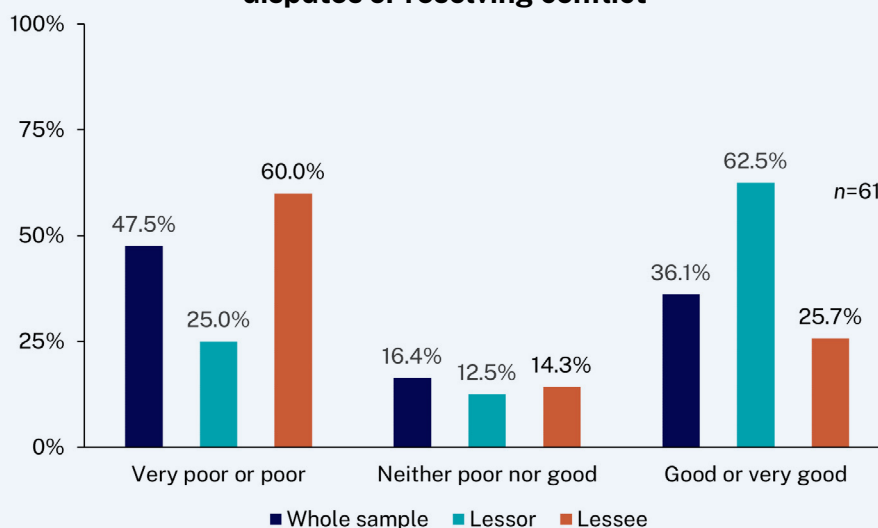
- Lessees taking possession of previous tenants' fit outs
- Side deals, including finance through side deal
- Understanding timeframes for option exercise and non-payment of rent
- Communication methods agreed to under the lease
- Maintenance of the premises
- Implications of demolition clauses.

Part VII - Dispute resolution

Dispute resolution is an important feature of good leasing practice. Under the Act, disputes can be resolved through mediation, by escalation to the NSW Civil and Administrative Tribunal (NCAT), and through the courts. Feedback and recommendations relating to dispute resolution are discussed below, noting the operation of NCAT is not within the scope of this Review.

As evidenced in **Figure 11**, lessees tend to have a poor experience when managing disputes or resolving conflict compared to lessors who indicated their experiences were generally positive.

Figure 11: Respondents that are familiar with the Act rating their experiences with managing disputes or resolving conflict²²



NCAT and referrals to compulsory mediation

Under section 68 of the Act, a retail tenancy dispute may not be the subject of proceedings before any court unless mediation has failed to resolve the dispute, or the court is otherwise satisfied mediation is unlikely to resolve the dispute.

There is a proportion of applications for original decisions that are accepted by the NCAT for determination without satisfying the requirement of the Act to attempt mediation before proceedings are taken. The Commission notes this does not include applications for urgent interim orders where a preliminary mediation attempt is not required. Under sections 68(1) or 68(2) of the Act, the Registrar of Retail Tenancy Disputes²³ issues a certificate confirming the outcome of an application for mediation (for example, that mediation has been attempted or refused by one party).

When a legislative obligation is applied, mediation is an effective dispute resolution mechanism for issues. The Commission has observed the mediation mechanism in the Act effectively prevents a sizeable proportion of disputes progressing to NCAT or court for determination. Over 85 per cent of mediation applications (for retail tenancy disputes and disputes under the COVID-19 Leasing Regulation) filed with the Registrar of Retail Tenancy resolve through preliminary dispute resolution assistance or mediation.

NCAT's jurisdiction to hear retail tenancy claims is authorised by Division 3 of Act and the *Civil and Administrative Tribunal Act 2013* (CAT Act). Part 4 of the CAT Act gives NCAT the authority to determine practice and procedure, including the discretion to consider the appropriateness of mediation for any matter.

²² Source: NSW Small Business Commission Retail Leases Act Survey, December 2022. See Appendix A, 2.4 for survey question.
²³ The functions of the of the Registrar of Retail Tenancy Disputes is the responsibility NSW Small Business Commissioner.

To ensure section 68 of the Act operates as intended, and to increase the referral of matters to mediation, the Commission proposes an amendment to the Act to limit the effect of section 37 of the CAT Act in relation to retail leases. Amendment to the Act would impose a compulsory requirement on NCAT to refer parties to a retail tenancy dispute for mediation if an application for a retail tenancy claim is filed with NCAT in any of the following circumstances:

- Without a section 68 certificate evidencing an attempt at mediation.
- If a mediation certificate has been issued under section 68(2) noting that mediation did not take place because one party refused or withdrew from mediation.

Recommendation 32– Compulsory mediation requirement

Amend section 68 to limit the effect of Part 4, Division 1 of the *Civil and Administrative Tribunal Act 2013*, to strengthen the compulsory mediation requirement and obligation to participate in mediation prior to a matter being considered at NCAT.

NCAT thresholds

Some feedback to the Review recommended increasing the threshold for accessing NCAT for dispute resolution from the current threshold of \$750,000 to \$1,000,000 (to reflect the increase in rent).

However, the NCAT threshold was increased from \$400,000 to \$750,000 in 2017. Review of market data indicates there has not been a substantial increase in rent since 2017.²⁴ The Commission assesses that \$750,000 remains a sufficient threshold at this time.

NCAT jurisdiction

The function of NCAT is to facilitate quick and cost-effective means for the parties to a retail lease to resolve disputes. Section 36(1) of the CAT Act provides the ‘guiding principles’ and procedural rules, namely to facilitate the ‘just, quick and cheap resolution of the real issues in the proceedings’.

Some stakeholders expressed concern in relation to the Tribunal Members’ varying degrees of experience and competency dealing with retail leasing claims, expressing a preference for the ‘specialist’ expertise of the former Administrative Decisions Tribunal of NSW (ADT). While this feedback is beyond the scope of this Review, a brief discussion is included for reference purposes only.

In 2013, NCAT took over the jurisdiction and work of 22 tribunals, including the ADT which had jurisdiction to determine retail tenancy disputes. The functions of the ADT were transferred to NCAT, and retail leasing disputes are now dealt with in the Consumer and Commercial Division. The *Retail Leases Act 1994* is one of 25 Acts that is dealt with in this division.

There are concerns that retail tenancy disputes are increasingly being dealt with by Tribunal members with skills and expertise more appropriate for dealing with consumer claims and that a specialist retail tenancy division should be established within NCAT. Some stakeholders expressed a preference for initiating proceedings in the Supreme Court rather than NCAT because of the current level of expertise.

The Commission has received similar representations from members of the legal profession and retail industry more broadly. Given this breadth of feedback, there is benefit in engaging further with NCAT to better understand the issues and potential solutions.

²⁴ LeaseInfo, Retail Shopping Centre Rents Post Covid (July 2022). Available at: [Retail Shopping Centre Rents Post Covid](#)

Part VIII – Legislative context

The efficiency and effectiveness of the Act is influenced by the broader context within which the Act operates, including how the Act interacts with retail legislation in other jurisdictions and how it interacts with other legislation in NSW.

Harmonisation

There are retail leasing Acts across the states and territories in Australia. Some stakeholders advocated for greater harmonisation with other jurisdictions in terms of minimum lease standards, harmonised disclosure statements and harmonised processes. Interjurisdictional harmony would provide benefits to some retail leasing industry participants, particularly where communities operate across jurisdictions or where individual lessors and lessees have multi-site leases across multiple jurisdictions.

COAG previously requested the Small Business Ministerial Council (SBMC) commence work to improve transparency and consistency between the retail tenancy regulations of different jurisdictions following the Productivity Commission's 2008 report *The Market for Retail Tenancy Leases in Australia*.

The established National Retail Tenancy Working Group (the working group) focussed on achieving greater national consistency, fairness and transparency in retail tenancy markets across jurisdictions, through the use of national disclosure statements and consistent data collection and reporting. The working group had broad representation from federal and state governments, various retail industry associations, small business, the property sector, and legal groups.

A core model national disclosure statement was endorsed by SBMC in 2009 and implemented in NSW, Queensland and Victoria from 1 January 2011. At the time of endorsement, SBMC noted the 'model disclosure statement will be adopted to the extent permitted' in jurisdictions where legislative and administrative differences are present. The working group was disbanded as they were 'unable to achieve national harmonisation on a number of key retail tenancy issues.'

While there was commonality between New South Wales, Queensland and Victoria, Victoria has since implemented four disclosure statements to be used depending on set circumstances. These circumstances include:

- Non-shopping centre retail premises
- Shopping centre retail premises
- Renewal of a lease
- Assignment of a lease with an ongoing business.

The Senate Economics References Committee published the report *Need for a National Approach to Retail Leasing Arrangements* in March 2015 after the Senate referred the matter. On the matter of inter-jurisdictional harmonisation, the Committee recommended the working group 'be re-established to develop a national disclosure statement, taking note of the lessons learnt from its previous attempts, and ensuring vital stakeholders are actively involved in any consultation process'. This recommendation does not appear to have been adopted by the Federal Government.

Developing a strategy for national harmonisation is beyond the scope of this Review. However, where appropriate, this Review has considered retail leasing requirements in other jurisdictions in terms of best practice and appropriateness to the NSW context. Where possible, consistent approaches should be adopted to address common challenges.

The Commission also notes the opportunity for NSW to be a national leader by ensuring the Act meets contemporary retail leasing needs. For example, by developing a digital platform for lease negotiation, NSW may be able to improve the experience and cost of lease negotiation for NSW retail businesses and lessors. These improvements may encourage other jurisdictions to adopt the digital platform for lease negotiation, leading to national harmonisation.

Interaction with other legislation

The Commission has considered feedback relating to the interaction of the Act with other legislation throughout this Review. For example, issues regarding the service of non-payment of rent notice prior to terminating the lease due to the *Conveyancing Act 1919* and the issue of providing notices by email were considered earlier in this Review.

Some stakeholders raised broader issues with the intersection between retail tenancy, strata scheme and franchising regulation. The additional layers of complexity present varying degrees of challenge depending on the specific interaction between these distinct legal frameworks.

While this Review has not considered these matters in detail, the Commission notes that legislative drafting of any amendments to the Act should have regard to the legislative context and the potential operation of other regulatory requirements.

Part IX – Next steps

Further consideration, consultation and analysis is required to affirm the suitability of the recommendations proposed by this Review.

Better Regulation Principles specify that further consultation and impact analysis, including an assessment of costs and benefits, is required to confirm the suitability of recommended legislative amendments. This can occur through a Better Regulation Statement or a Regulation Impact Statement.

To assist in this Review’s next steps, the below table categorises the recommendations according to potential approaches for undertaking further consideration, consultation and analysis. This includes identifying potential approaches for legislative amendments and non-legislative supports.

Proposed approaches for undertaking further consideration, consultation, and analysis of recommendations

Further policy development and consultation	
Part III – The Retail Leases Act and its objectives	Recommendation 1: Include an ‘Objects Provision’ within the Act.
Part V – Entering a lease	Recommendation 8: Undertake further policy development and codesign to refine and develop key features of a standard lease under the Optional Simplified Standard Lease model.
	Recommendation 13: Initiate a feasibility study on the development of a digital platform to support lease negotiations and ongoing management of a retail lease. This feasibility study should align with relevant NSW Government requirements, such as the NSW Government ‘Design Standards’ for effective design and delivery practices for customer-focussed services.
Part VI – Safeguards of the Act	<p>Recommendation 31: Develop the pre-lease fact sheet and digital platform to complement and improve the usefulness of existing support materials. The supporting infrastructure for the Act should help improve outcomes with respect to risks and awareness of:</p> <ul style="list-style-type: none"> • Lessees taking possession of previous tenant’s’ fit outs • Side deals, including finance through side deal • Understanding timeframes for option exercise and non-payment of rent • Communication methods agreed to under the lease • Maintenance of the premises • Implications of demolition clauses.

Consultation or consideration prior to Regulatory Impact Assessment

Part VI – Safeguards of the Act

Recommendation 16: Consider a preliminary process change to require lessors and/or agents to register in Retail Bonds Online (RBO) to access lodgement forms. Based on the uptake of RBO lodgement, there may be the option to reduce the timeframe for bond lodgement in the future.

Recommendation 21: Undertake further consultation to consider an update to section 31(4) to allow for the disclosure of valuation information in strip malls and standalone premises, with clear exclusions for shopping centres.

Recommendation 23: Undertake further consultation to consider an amendment to section 39(1)(b) to clarify that the proposed assignee has financial resources or retailing skills sufficient to meet the obligations under the lease.

Recommendation 24: Consider a definition or clarification of ‘permitted use’ under section 3 or section 39 to specify a generic category of retail shop, such as the Prescribed List, rather than a specific brand or trading name, for the purpose of lease and assignment under section 39(1)(a).

Progress to Regulatory Impact Assessment

Part IV – Defining retail shop businesses

Recommendation 5: Relocate Schedule 1A to the Regulation to streamline legislative arrangements.

Recommendation 6: Amend section 5(d) to clarify an exception for ancillary rights excluded by Schedule 1A where the spaces (such as car parking, signage or storage) are conferred or used in conjunction with operating the primary business of the retail lease.

Part V – Entering a lease

Recommendation 9: Maintain the 7-day timeframe for providing the lessor’s disclosure statement as per section 11 of the Act and amend to add a provision providing an option of a waiver where the lessor and lessee have each engaged a legal practitioner.

Recommendation 10: Adapt the disclosure model to provide tailored disclosure statements for non-shopping centre retail premises, shopping centre retail premises, and sub leases under a Crown lease or a head lease. This can be affected by legislative amendment to move Schedule 2 to the Regulation and the consideration of a regulation making power to allow for streamlined review.

Recommendation 11: Develop a short and informative ‘before you lease’ factsheet to be prescribed under section 9(1)(b)(ii) with relevant links to seek further information in the current Retail Tenancy Guide.

Recommendation 12: Amend section 16(2)(a) to provide the lessee an extension for delays arising from the requirement to provide proof of insurance, bank guarantees, and other relevant documents pertaining to the lease.

Part VI – Safeguards of the Act

Recommendation 14: Amend section 44A1(b) to clarify that if a lessor provides written notice to a lessee, a lessor can advertise the availability of a shop for lease while also inviting the existing lessee to make an offer or express their interest. Maintain restrictions for existing occupancy arrangements.

Recommendation 15: Amend the definition of ‘lease preparation expenses’ under section 3 of the Act to exclude Electronic Lodgement Network Operator costs.

Part VI – Safeguards of the Act	Recommendation 17: Amend section 28(1)(b1) to address stakeholder concerns regarding lack of transparency in outgoings for leases within shopping centres. The amendment can specify the component cost of outgoings including services such as security and sanitation. Additionally, monitor any issues in relation to the effectiveness of marketing expenditure.
	Recommendation 18: Adjust the requirement in section 28 so that outgoings statements for retail leases outside of a shopping centre can be prepared by a Certified Public Accountant, while retail leases within shopping centres will maintain the registered company auditor requirement.
	Recommendation 19: Amend section 23 to allow parties to mutually agree on cost recovery arrangements where both parties are a shared beneficiary (such as upgrades to improve energy efficiency). Additionally, the Commission recommends the inclusion of a definition of ‘capital costs’ within the Act.
	Recommendation 20: Update section 20 to clarify that pharmaceutical-related sales should be excluded from turnover rent.
	Recommendation 22: Progress an amendment to section 44 of the Act to clarify that the notice to the lessee, of the lessor’s intention at end of lease, is required not less than 6 months and not more than 12 months before the expiry of: <ul style="list-style-type: none"> • The lease term (if there are no options), or • The lease extension or option period.
	Recommendation 25: Amend section 14 of the Act to remove the prohibition to enable lessors to recover lease preparation expenses in circumstances where the existing lease could be assigned but the parties instead agree to enter a new lease.
	Recommendation 26: Amend section 41A of the Act to reflect ongoing liability of the assignor will be released, so long as an updated lessor’s disclosure statement has been provided to the assignee at least seven days before the assignment of the lease.
	Recommendation 27: Amend section 34A(c) of the Act to specify the appropriate consideration of commercial factors such as exposure to foot traffic, surrounding retail mix, shape or nature of a premises and road frontage.
Recommendation 29: Removal of Part 11 (response to COVID-19 pandemic) from the Act (retaining relevant savings provisions).	
Recommendation 30: Extend the existing Part 9A provisions applying to Sydney (Kingsford-Smith) Airport to the future Western Sydney International (Nancy-Bird Walton) Airport.	
Part VII – Dispute Resolution	Recommendation 32: Amend section 68 to limit the effect of Part 4, Division 1 of the <i>Civil and Administrative Tribunal Act 2013</i> , to strengthen the compulsory mediation requirement and obligation to participate in mediation prior to a matter being considered at NCAT.

Assess and monitor

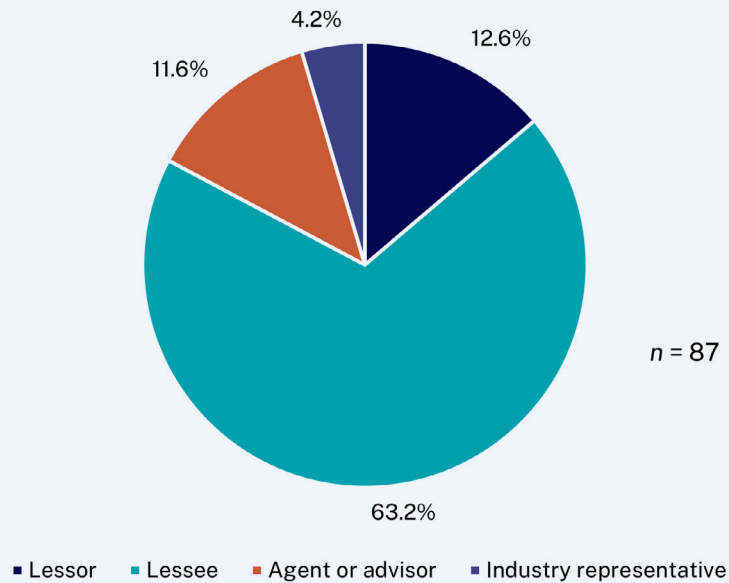
Part IV – Defining retail shop businesses	Recommendation 2: Continue to define retail by the definitions in the Act and the Prescribed List in Schedule 1 of the Regulation and monitor for emerging issues.
	Recommendation 3: Monitor for any disputes for hybrid businesses in relation to the jurisdiction of the Act to determine whether legislative amendment to define ‘predominant use’ is warranted.
	Recommendation 4: Assess and review the Prescribed List in Schedule 1 every three years to confirm the appropriate capture of emerging types of retail.
Part VI – Safeguards of the Act	Recommendation 28: Monitor any emerging disputes and issues relating to situations where the lessor has not demonstrated to the lessee the criteria for triggering a demolition clause as specified in section 35(1)(a1).
Further policy consideration for broader issue	
Part IV – Defining retail shop businesses	Recommendation 7: Consideration to be given to opportunities to improve outcomes for small motels experiencing poor commercial arrangements due to ratchet clauses. This could include consideration of regulatory options within the <i>Conveyancing Act 1919</i> or the <i>Real Property Act 1900</i> for new leases (for example compulsory mediation provisions in leases), and non-regulatory options outside the Act to support improved outcomes for historic leases.

Appendix A – Summary of survey results

Retail Leases Act Survey, December 2022

1. Demographics

1.1. Which of the following best describes your role as it relates to retail lease arrangements?

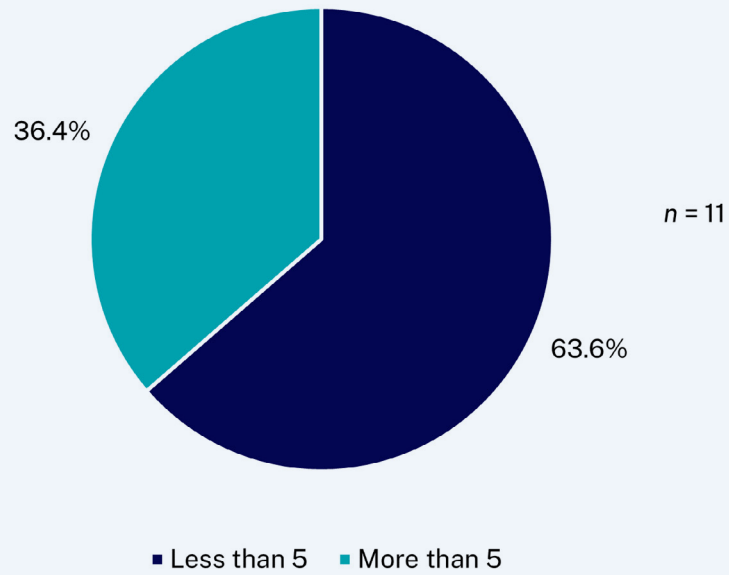


Lessor

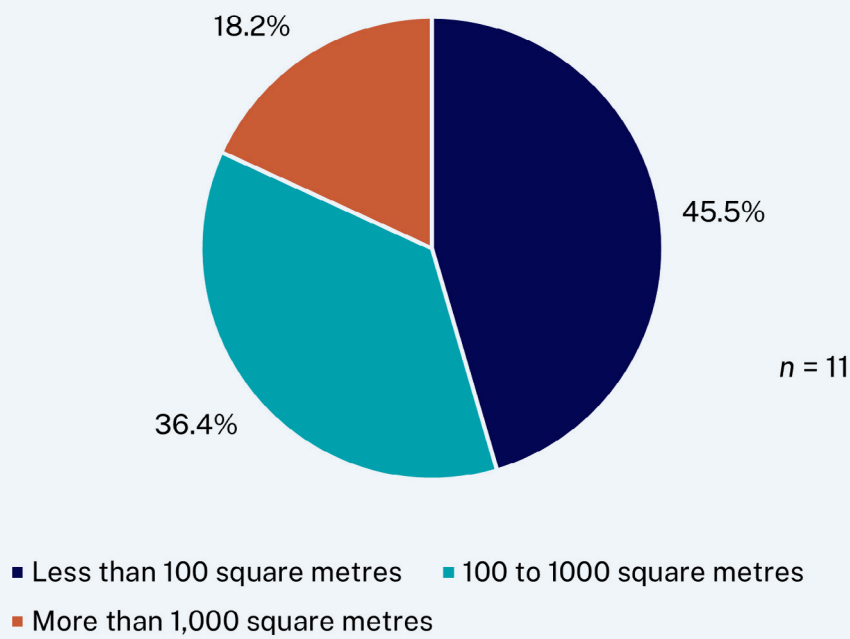
1.2. Which of the following best describes your circumstances as a landlord?



1.3. How many retail shop premises are within your organisation's portfolio?

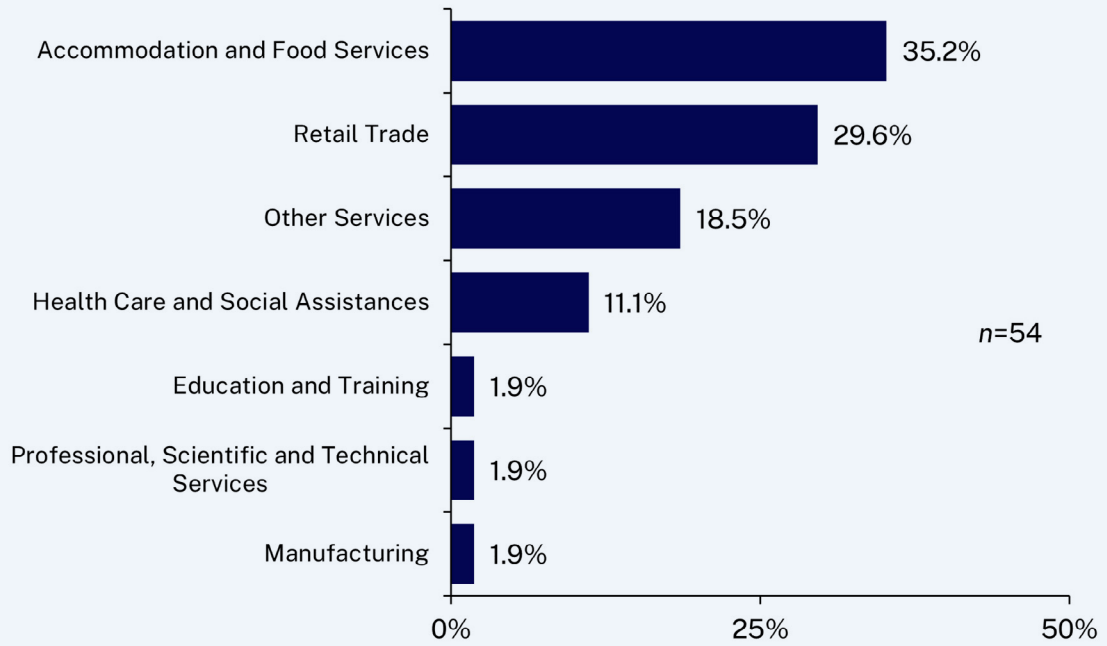


1.4. Approximately how many square metres is the retail premises owned by you or your organisation? If you have more than one, please indicate the average or typical size per lease)

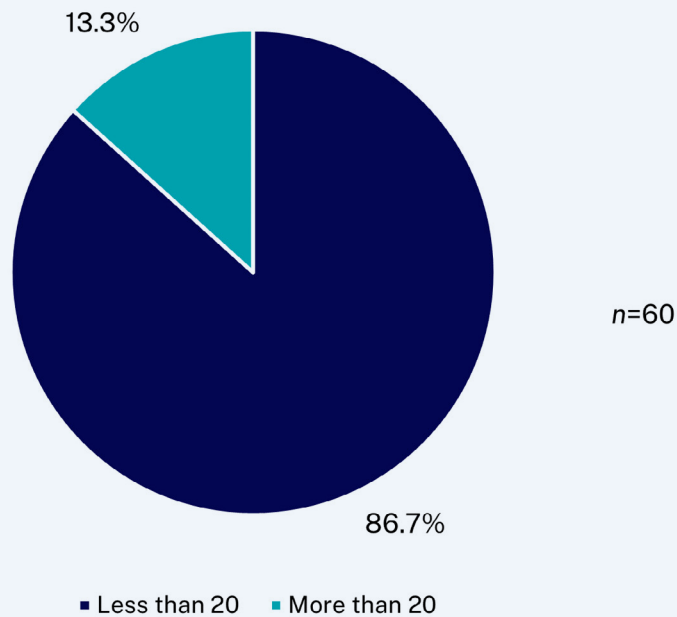


Lessee

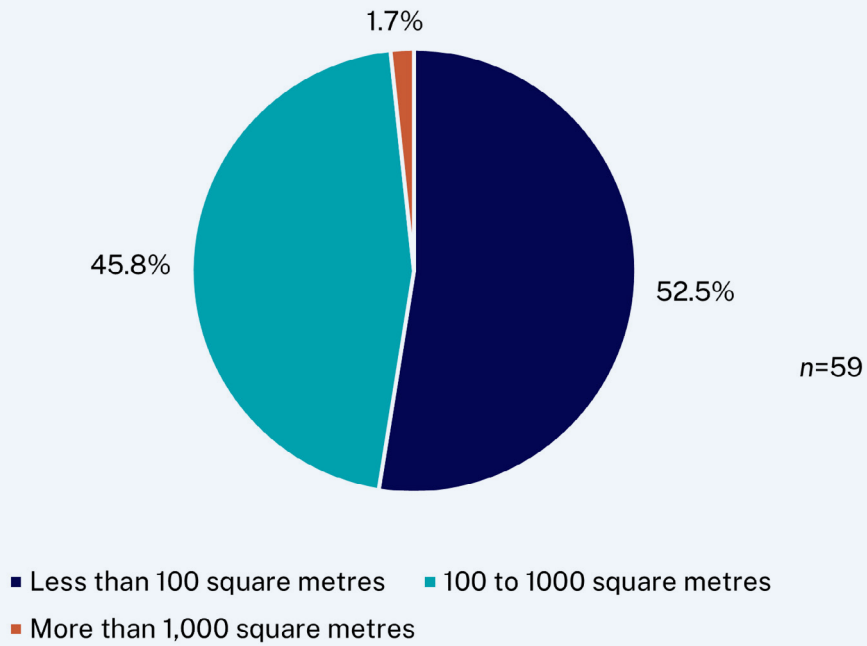
1.5. Please list what type of retail shops are operated by your organisation, if multiple please describe.



1.6. How many employees are there in your organisation?

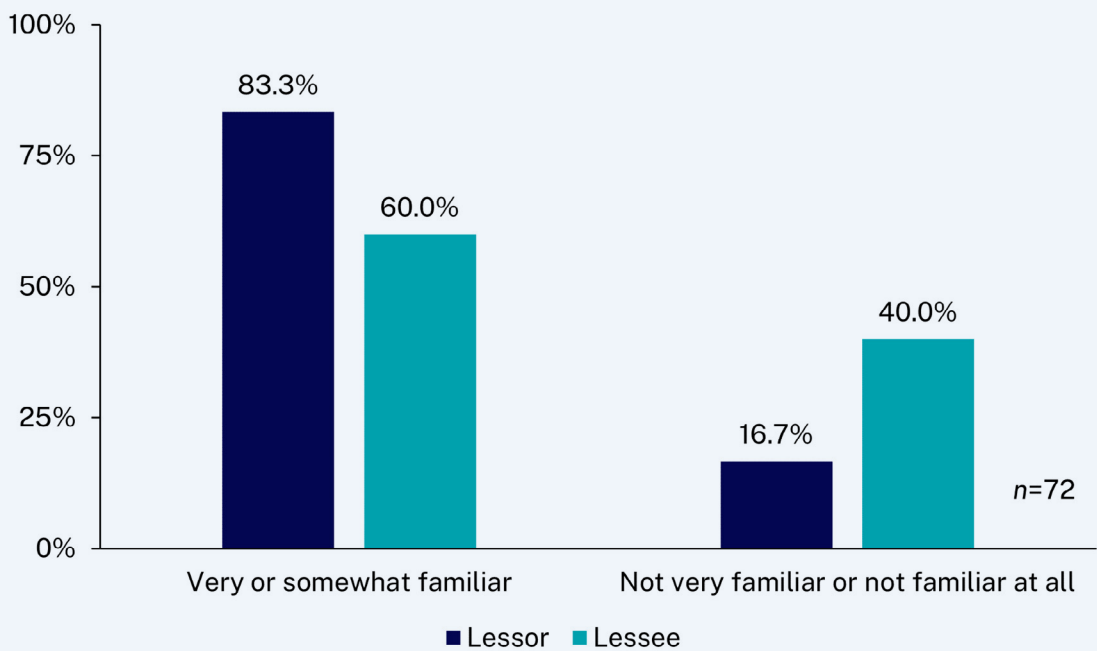


1.7. Approximately how many square metres is your retail premise? If you have more than one, please indicate the average or typical size.

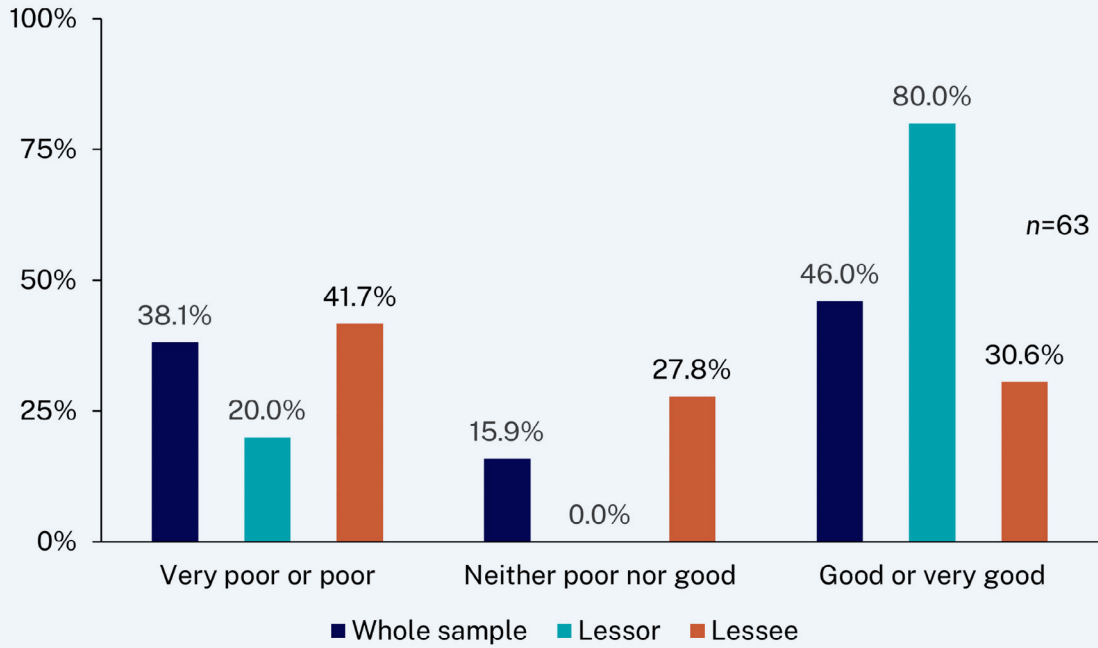


2. Results

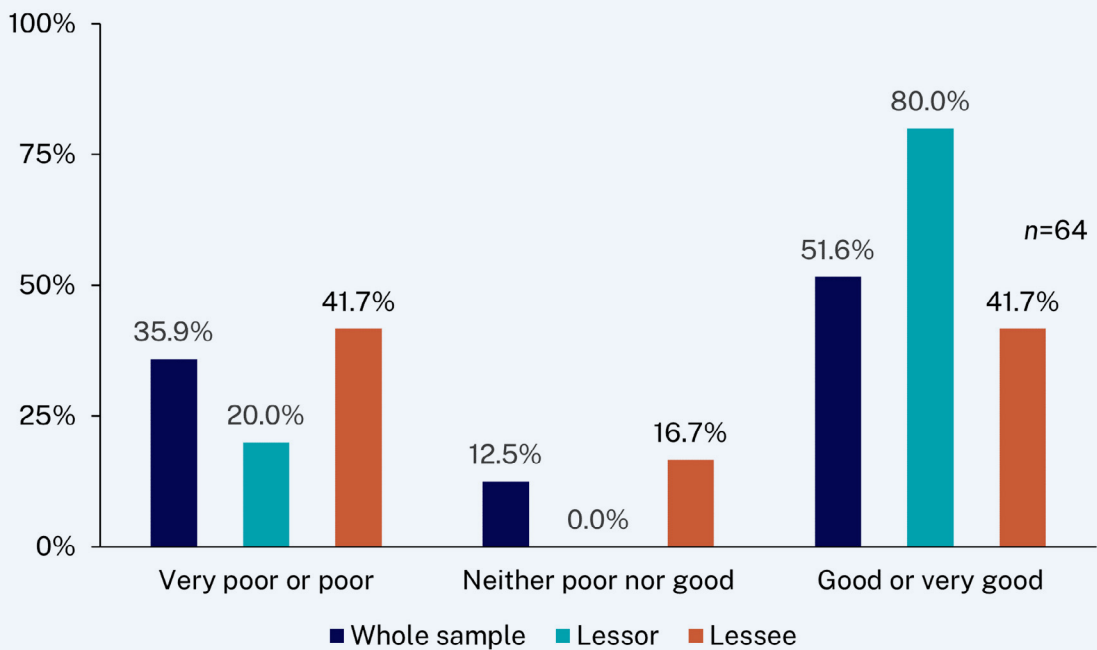
2.1. The Retail Leases Act is the legislation that regulates leasing practices for the retail industry. How familiar are you with the details and requirements of the Retail Leases Act?



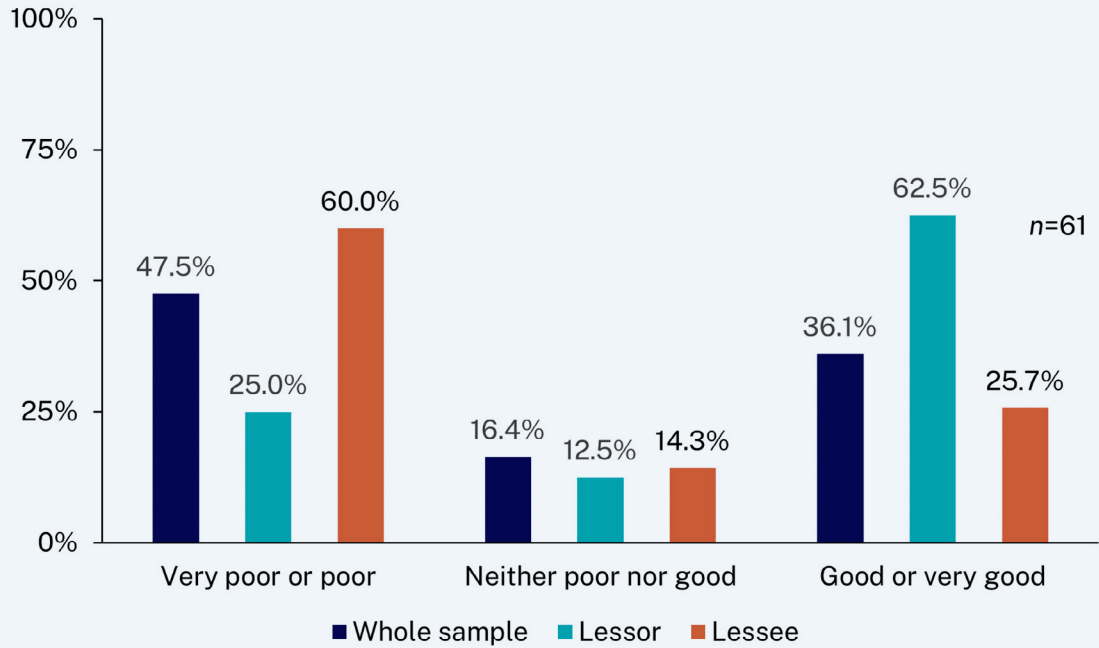
2.2. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, how would you rate your experiences with negotiating and entering a lease contract?



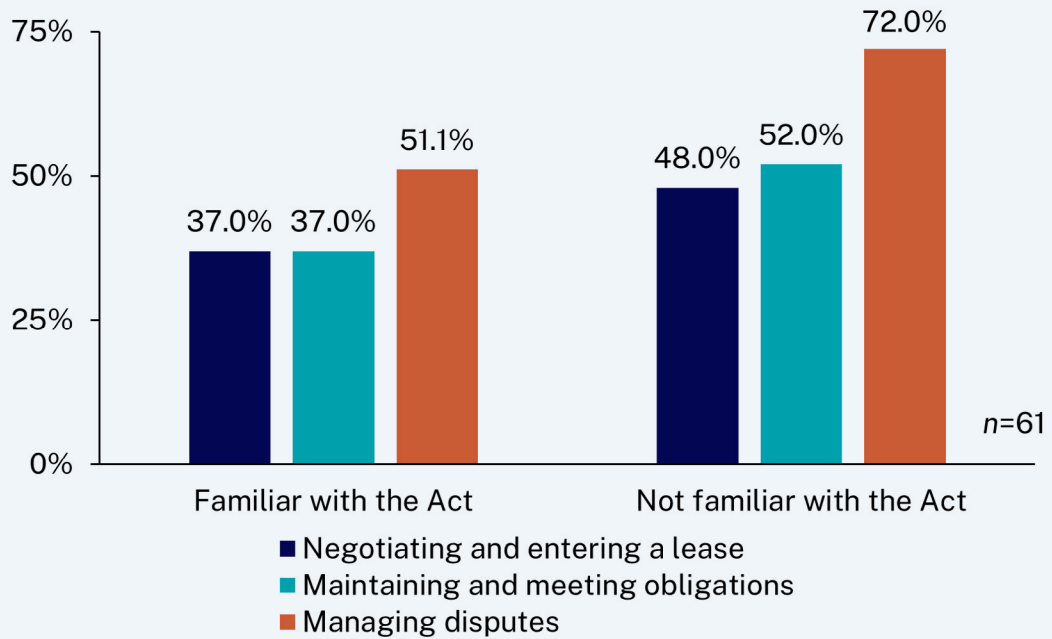
2.3. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, how would you rate your experiences with maintaining and meeting obligations with a lease contract (such as processes for renewing a lease or reviewing rent)?



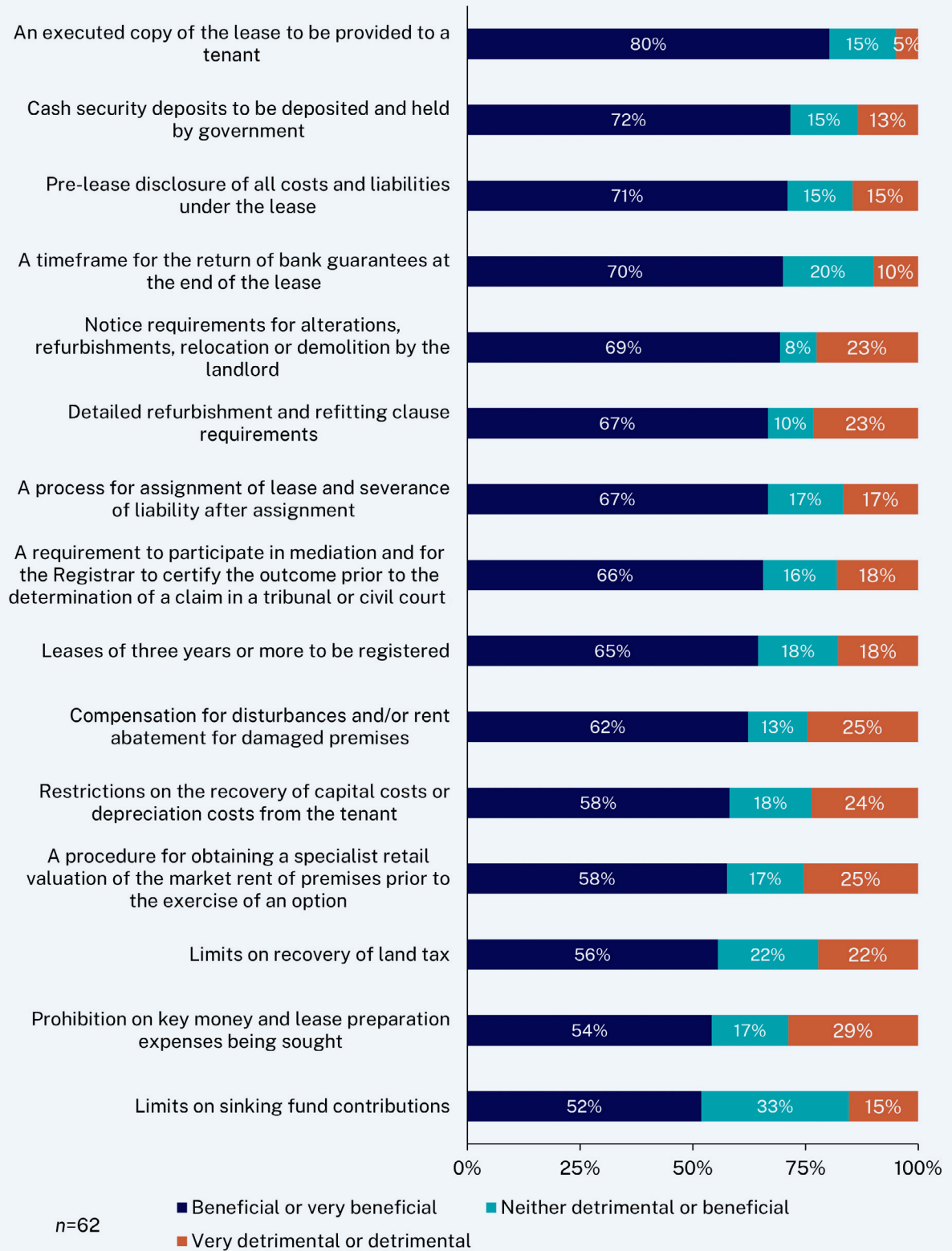
2.4. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, how would you rate your experiences with managing disputes or resolving conflict?



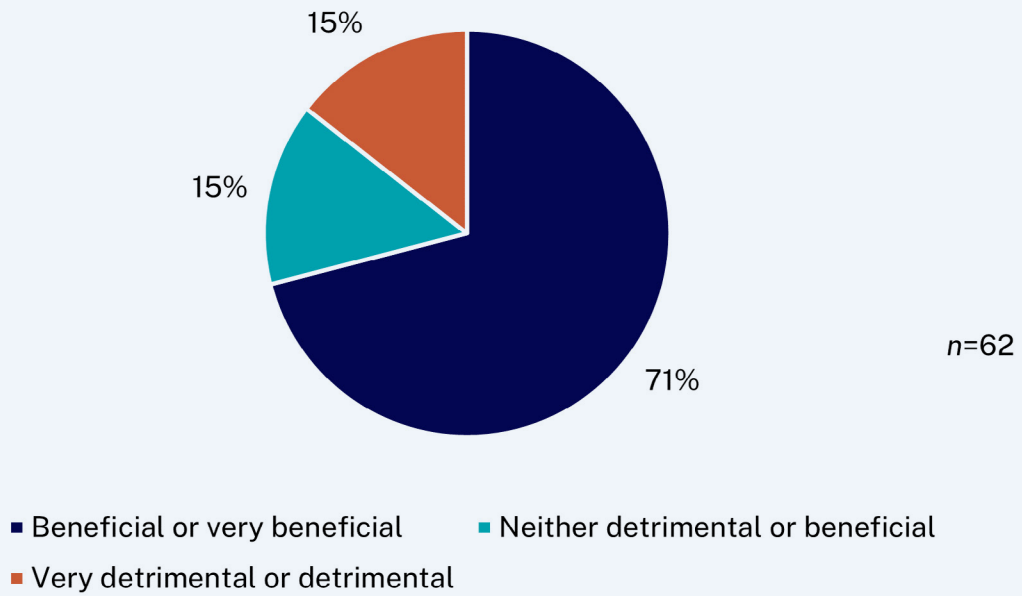
2.5. If respondent answered 'lessor' or 'lessee' to 1.1 and rated their experience with the following as 'very poor' or 'poor':



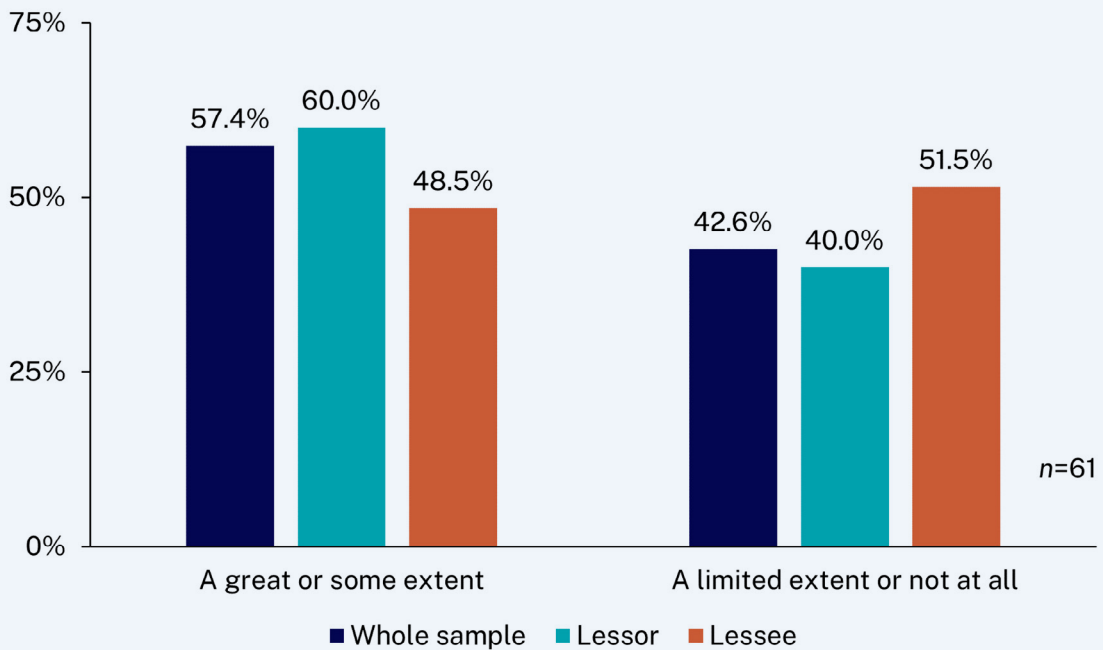
2.6. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, how beneficial are the following the features of the Retail Leases Act in encouraging good leasing practices?



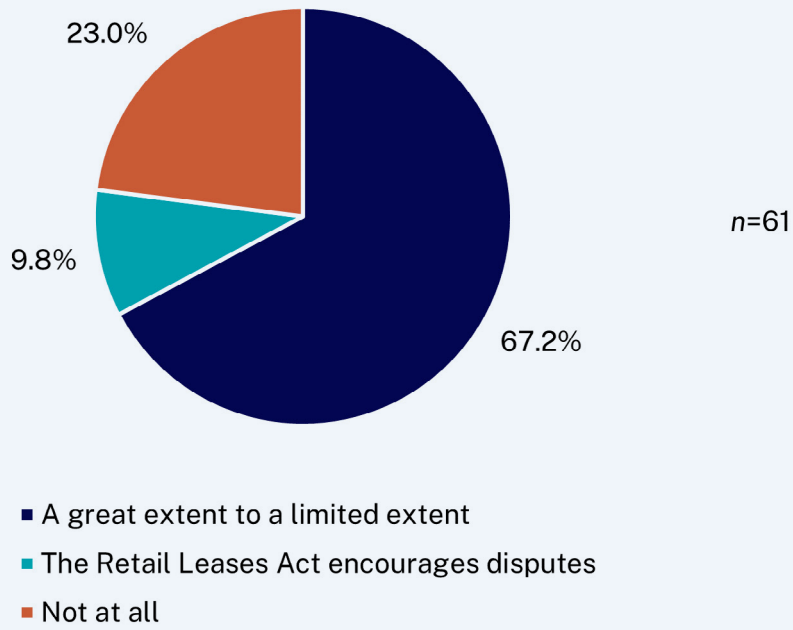
2.7. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, how beneficial is pre-lease disclosure of all costs and liabilities under the lease?



2.8. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, to what extent do you think the Retail Leases Act encourages good leasing practices?



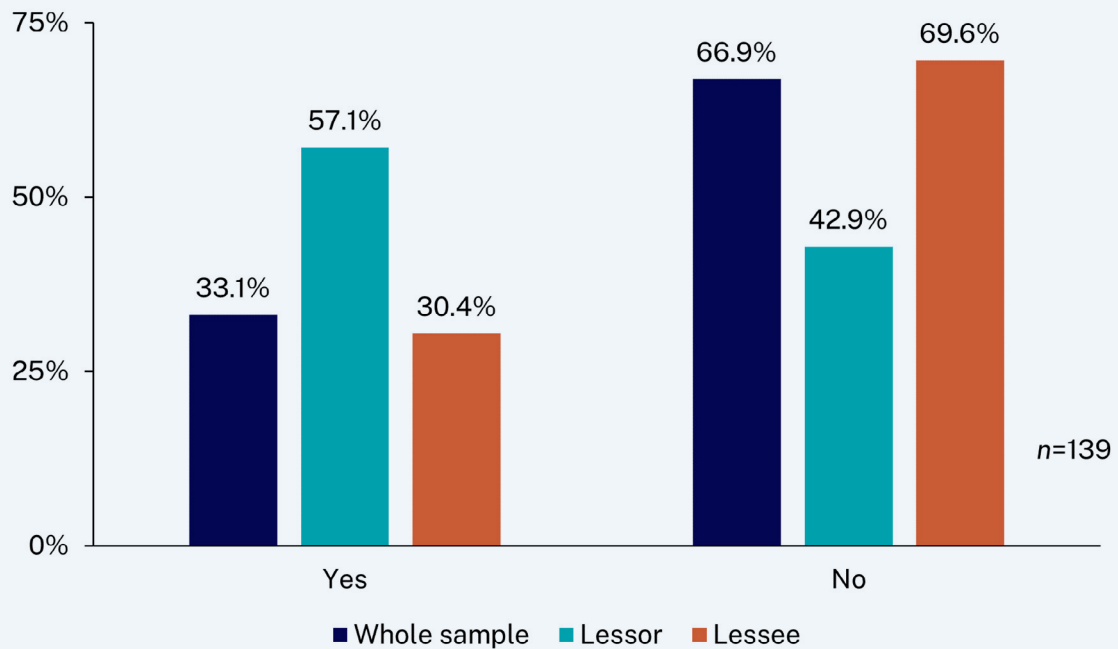
2.9. If respondent answered 'very familiar' or 'somewhat familiar' to 2.1, to what extent do you think the Retail Leases Act is assisting to reduce or lessen the impact of disputes?



Momentum Survey, April 2023

3. Results

3.1. Have you accessed legal advice as part of the negotiation or ongoing management of your retail lease?



Appendix B - State and Territory Retail Tenancy Legislation (Objects)

Legislation	Objectives
<p>Retail Leases Act 2003 (VIC)</p> <p>Retail Leases Act 2003 (legislation.vic.gov.au)</p>	<p>1 Main purpose</p> <p>The main purpose of this Act is to replace the scheme in the Retail Tenancies Reform Act 1998 with a new scheme to enhance —</p> <p>(a) the certainty and fairness of retail leasing arrangements between landlords and tenants; and</p> <p>(b) the mechanisms available to resolve disputes concerning leases of retail premises.</p>
<p>Retail Shop Leases Act 1994 (QLD)</p> <p>Retail Shop Leases Act 1994 (legislation.qld.gov.au)</p>	<p>Part 2 Object of Act and its achievement</p> <p>3 Object of Act</p> <p>The main object of this Act is to promote efficiency and equity in the conduct of certain retail businesses in Queensland.</p> <p>4 How main object of Act to be achieved</p> <p>The main object of this Act is to be achieved through —</p> <p>(a) mandatory minimum standards for retail shop leases; and</p> <p>(b) a low cost dispute resolution process for retail tenancy disputes.</p>
<p>Retail and Commercial Leases Act 1995 (SA)</p> <p>Retail and Commercial Leases Act 1995 South Australian Legislation</p>	<p>Objects: Nil.</p>
<p>Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)</p> <p>WALW - Commercial Tenancy (Retail Shops) Agreements Act 1985 - Home Page (legislation.wa.gov.au)</p>	<p>Long Title</p> <p>An Act to regulate commercial tenancy agreements relating to certain shops, to prohibit unconscionable conduct, or misleading or deceptive conduct, by landlords or tenants in relation to such agreements, to provide for the determination of questions arising under such agreements, and for connected purposes.</p> <p>Objects: Nil.</p>

<p>Leases (Commercial and Retail) Act 2001 (ACT)</p> <p>Leases (Commercial and Retail) Act 2001 Acts</p>	<p>Long Title: An Act to regulate commercial and retail leases and tenancies, and for other purposes.</p>
<p>Retail Leases Act 2022 (TAS)</p> <p>act-2022-039 (legislation.tas.gov.au)</p>	<p>Long Title: An Act to make provision in relation to leases of certain retail premises and other business premises, and the rights and obligations of landlords and tenants of those retail premises and other business premises, to continue in force the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998, and for other related purposes.</p> <p>3. Objects of Act</p> <p>The objects of this Act are to facilitate –</p> <ul style="list-style-type: none"> (a) the certainty and fairness of retail premises leasing arrangements between landlords and tenants; and (b) the mechanisms available to resolve disputes concerning retail leases; and (c) the certainty and fairness of certain other aspects of retail leases.
<p>Business Tenancies (Fair Dealings) Act 2003 (NT)</p> <p>Legislation Database (nt.gov.au)</p>	<p>3 Objects</p> <p>The main objects of this Act are to enhance:</p> <ul style="list-style-type: none"> (a) the certainty and fairness of retail shop leasing arrangements between landlords and tenants; and (b) the mechanisms available to resolve disputes concerning retail shop leases; and (c) the certainty and fairness of certain other aspects of business tenancies.

Links directory

Full URLs of links used in document references

Draft Retail Leases Regulation, Regulatory Impact Statement (2022).

www.smallbusiness.nsw.gov.au/sites/default/files/2022-10/PUBLIC%20CONSULTATION%20-%20Regulatory%20Impact%20Statement%20-%20Draft%20Retail%20Leases%20Regulation%202022_0.pdf

Retail Leases Bill Second Reading (20 April 1994).

www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-94871

Guidelines to the Retail Leases Act 2003 – What are “retail premises”? (2019).

www.vsbcb.vic.gov.au/wp-content/uploads/2019/03/Retail-Premises-Guidelines-Amended-March-2019.docx

Retail Leases Regulations 2023 Regulatory Impact Statement (February 2023).

djsir.vic.gov.au/___data/assets/word_doc/0007/2147254/Retail-Lease-Regulations-2023-Regulatory-Impact-Statement-RIS-FINAL.docx

NSW Retail Tenancy Guide (2022).

www.smallbusiness.nsw.gov.au/Retail-Tenancy-Guide-2020

The Market for Retail Tenancy Leases in Australia (March 2008).

www.pc.gov.au/inquiries/completed/retail-tenancies/report/retail-tenancy-market.pdf

Retail Shopping Centre Rents Post Covid (July 2022).

www.leaseinfo.com.au/retail-shopping-centre-rents-post-covid/#:~:text=Table%20%20shows%20that%20the,which%20consistent%20with%20previous%20years