Queensland Government

Department of Justice and Attorney-General
Office of the Director-General

In reply please quote: 565871/1, 3118816

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Mr Scott Stewart MP
Chair
Education, Tourism and Small Business Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Stewart

Thank you for your letter dated 14 October 2015 regarding the referral of the Retail Shop Leases Amendment Bill 2015 (the Bill) to the Education, Tourism and Small Business Committee (the Committee).

Your letter noted that the Committee may seek the Department of Justice and Attorney-General's (DJAG) written response on issues raised in submissions to the Committee on the Bill.

On 27 November 2015, the Committee's Research Director requested DJAG's written response to the following issues raised in submissions received by the Committee on the Bill:

- Assistant Professor Johnson, Bond University - Item 3.5 – clause 5 meaning of retail shop, in particular, the exclusion of non-retail leases from the operation of the Act;
- Shopping Centre Council of Australia – page 2, public companies and their subsidiaries (paragraph 1) and commencement clause (paragraph 2);
- Queensland Law Society – entire submission;
- Property Council of Australia – page 2, paragraphs 6 to 9 (disclosure, public companies, rent review, outgoings); and
- North Queensland Airports – entire submission.

Please find enclosed DJAG's response to the above request. I apologise for the delay in providing this response.

I trust this information is of assistance.

Yours sincerely

David Mackie
Director-General

Enc.

Submissions to the Education, Tourism and Small Business Committee on the Retail Shop Leases Amendment Bill 2015

Department of Justice and Attorney-General Response

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North Queensland Airports (NQA)	
To the extent that it relates to matters regulated under the *Retail Shop Leases Act 1994* (the Act), the NQA submission: • states that, in accord with previous retail leases established by the Cairns and Mackay Port Authorities and the provisions of the *Airport Assets (Restructuring and Disposal Act 2008* (AARD Act objectives), the Cairns and Mackay airports do not have any restrictions regarding retail lease terms, conditions, rent reviews and recoverable costs; • notes that the Bill remains silent on the treatment of retail activity on Cairns and Mackay Airport lands holdings; and • submits that the Act should be amended (to reflect the current policy framework under the AARD Act objectives and current retail operating arrangements) by exempting all retail businesses on Cairns and Mackay Airport land holdings from any requirements that may limit hours of operation and erode existing retail shop lease provisions.	The matters raised in the NQA submission (including the request for outright exclusion of the Cairns and Mackay airports from the operation of the Act) have not previously been raised by NQA. A related entity, Cairns Airport Pty Ltd (CAPL), made a submission to the Department of Justice and Attorney-General (DJAG) dated 14 February 2014 (CAPL submission). This submission (which is publicly available on the link below) was framed on behalf of the NQA Group and addressed the following matters: exclusion of publicly listed/international corporations from the operation of the Act; exclusion of non-retail leases in a shopping centre from operation of the Act; turnover rent; rent reviews; and the prohibition on landlord recovery from the tenant of legal costs for preparation/negotiation of lease: https://publications.qld.gov.au/dataset/retail-shop-leases-act-review-submissions-in-response-to-the-options-paper The matters raised by NQA in its submission to the Committee are outside the scope of the Bill. However, consideration is being given to the submission to the extent that it relates to matters regulated under the Act. <u>Trading hours:</u> The NQA submission regarding 24/7 trading for retail businesses on Cairns and Mackay airport land holdings and the *Trading (Allowable Hours) Act 1990* (TAH Act) is not relevant to the Bill. The TAH Act falls within the portfolio responsibility of the Minister for Employment and Industrial Relations. Current Part 7 of the Act (Retail shop lease trading hours) is directed to protecting retail businesses located in a retail shopping centre from being required to trade outside of the

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	core trading hours for that shopping centre (core trading hours). *Core trading hours* are defined for the purposes of the Act as hours not outside the allowable trading hours under the TAH Act: section 51 of Act. Clause 53 of the Bill replaces and updates existing section 53 of the Act, which voids a provision in a lease that purports to require a tenant to trade outside the core trading hours for a shopping centre. Clause 53 includes a new provision to clarify that a clause in a lease that permits (rather than requires) the tenant to open the shop for trading outside the core hours for the centre is not void. This amendment will clarify that tenants may trade outside of shopping centre core hours (but within the allowable trading hours under the TAH Act) by agreement with the landlord.
Property Council of Australia (PCA) *** The PCA was represented on the on the stakeholder reference group for the recent statutory review of the *Retail Shop Leases Act 1994* (reference group)**	
Issue 1: New requirement for landlord disclosure to sitting tenant on renewal of option	
The PCA does not support proposed section 21E (Lessor's disclosure obligation to lessee for renewal) on the basis that it would increase red tape for landlords.	Currently, the disclosure provisions in Part 5 of the Act (including lessor disclosure) do not apply to a retail shop lease entered into or renewed under an option: section 21(1)(b). Clause 15 of the Bill inserts new section 21E of the Act, which requires a landlord (subject to written waiver given by the tenant) to give a current disclosure statement to a tenant who exercises an option to renew under the retail shop lease (renewal notice). If a tenant waiver is not given, the landlord will be required to give the current disclosure statement to the tenant within 7 days after receipt of the renewal notice. The tenant may then, within 14 days after receipt of the current disclosure statement, give the landlord written notice that the renewal notice is withdrawn. The majority of the reference group (including legal and all retailer representatives) support this provision as a mechanism to protect sitting tenants. The provision will enable a sitting tenant to make a fully informed decision whether or not to renew the lease having regard to the details contained in the current disclosure statement. In particular, a sitting tenant may not otherwise have knowledge of material proposals regarding the shopping centre that may seriously impact the future viability of the tenant's business (i.e. the expiry of major/anchor tenancies, or the landlord's intentions regarding future centre redevelopment/refurbishment).

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	The reference group majority considered that the increased red tape for landlords was justified to protect sitting tenants. The information required for updated disclosure would also be readily available to a landlord.
Issue 2: Exclusion of leases by listed corporations/ their subsidiaries	
The PCA supports the exclusion of leases by publicly listed corporations and their subsidiaries from the operation of the Act (listed corporation exclusion).	This submission is beyond the scope of this Bill. Currently in Queensland, a lease of a retail shop for which a listed corporation (or a subsidiary of a listed corporation) is tenant is excluded where the floor area of the leased shop is more than 1000m^2. The Bill does not alter this. The Bill amends the Act to exclude all leases with a floor area greater than 1000m^2. A listed corporation exclusion has not been progressed in the Bill as it was opposed by the reference group majority based on retailer and legal stakeholder concern that such exclusion would deprive a significant proportion of Queensland retail franchisees of statutory protection. DJAG will continue to monitor this issue with regard to relevant developments in other jurisdictions.
Issue 3: Opt out of implied rent review provisions by tenants who are not 'major lessees'	
The PCA states that the proposed amendments would allow major lessees the opportunity to opt out of void rent review provisions and that this opportunity should be extended to all tenants. A *major lessee* is a tenant with five or more retail shop leases nationally: Schedule to Act.	Clause 24 of the Bill simplifies the existing provision in section 27(8) of the Act which allows major lessees to opt out of the statutory requirements for timing and bases of rent review (implied rent review provisions) by giving a written notice to the landlord. The existing major lessee opt out provision is considered appropriate as major lessees are sophisticated tenants who would reasonably be expected to negotiate mutually acceptable rent review provisions with their landlord. Sections 36 of the Act provides that certain rent review provisions in a retail shop lease are void and section 36A of the Act voids a ratchet rent in a retail shop lease. Clauses 30 and 31 of the Bill amend sections 36 and 36A respectively to clarify that a relevant rent provision in a lease is not void if the tenant is a major lessee who has given an opt out notice to the landlord under section 27(8) of the Act. The Bill does not include the amendment sought by the PCA to allow tenants who are not major lessees to opt out of the implied rent review provisions (and to clarify that an

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	otherwise prohibited ratchet or rent review provision in the lease is not void) to maintain existing protection for unsophisticated retail tenants. The amendments sought by the PCA were not supported by the review reference group majority and there are no equivalent provisions in other State/Territory retail leasing legislation. DJAG will keep a watching brief on this issue having regard to developments in other jurisdictions.
Issue 4: Amend to allow tenant to waive requirement for landlord to provide audited annual statement of outgoings	
The PCA notes that clause 33 of the Bill (new section 38B) retains the existing requirement under the Act for a landlord to give the tenant an annual audited statement of outgoings. The PCA submits that this requirement can be onerous for small landlords who may only own one tenancy with limited outgoings and that an option for tenants to waive the requirement would assist in reducing red tape.	This is a new submission that was not raised (by the PCA or any other stakeholder) during the review public consultation or reference group process. The submission is outside the scope of, but will be considered separately to, the current Bill.
Shopping Centre Council of Australia (SCCA) *** The SCCA was represented on the reference group**	
The SCCA supports the exclusion of leases by publicly listed corporations and their subsidiaries from the operation of the Act (listed corporation exclusion). The SCCA notes that clause 2 of the Bill provides for commencement on a date to be fixed by proclamation and submits that the amendments contained in the Bill should not commence until six months after assent to allow adequate notice to Queensland retail landlords and tenants to prepare for the changes.	For the reasons set out above for the PCA's equivalent submission (see PCA Issue 2) -, a listed corporations exclusion is beyond the scope of this Bill. This submission remains under consideration. The SCCA and other reference group members will be consulted further on the timeframe for commencement of the amendments contained in the Bill.
Queensland Law Society (QLS) ***The QLS was represented on the reference group**	
Clause 2: Commencement	
The QLS notes that the Bill provides for commencement on a date to be fixed by proclamation and submits that it would assist	This submission remains under consideration. The QLS and other reference group members will be consulted further on the commencement timeframe.

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lease parties, the legal and accounting professions and the retail community for there to be a reasonable time period before the amendments come into force.	
Clause 9: Replacement of section 11 (Application of Act – when lease entered into)	
The QLS recommends that section 11A of the Act be amended to provide that an assignment takes effect on the earlier of: (a) the date provided for in an agreement between the assignor and the assignee with the consent of the landlord; and (b) the date the assignee enters into possession of the premises with the consent of the landlord (QLS recommendation 1) The QLS also notes that corresponding amendments would be required to references to an assignment being entered into in the Act.	The technical concerns set out in this section of the QLS submission (but not QLS recommendation 1) were raised by the QLS during consultation on the draft Bill and considered during drafting. The QLS recommendation will be considered in further consultation with key stakeholders.
Clause 15: New sections 21C (Sublessor's disclosure obligation to sublessee) and 21D (Franchisor's disclosure obligation to franchisee)	
The QLS notes that a franchisor (who is the tenant of premises under a retail shop lease) may grant a franchisee either a licence to occupy (franchise LTO) or sub-lease (franchise sublease) of the premises for the purposes of carrying on the retail business under the franchise agreement. The QLS submits that: • it is not clear from new sections 21C and 21D which section would apply for a franchise sublease; • section 21D should be removed and section 21C amended to include a licence to occupy generally; • if section 21D is retained, the tag definition of *franchisor* in that section should be replaced with the definition of	This submission is new and was not raised by the QLS in consultation on the draft Bill. Clause 15 of the Bill inserts new section 21C and section 21D, which set out how the lessor disclosure obligation in the Act is to be complied with for: • a sublease (which would include, but is not limited to, a franchise sublease) (section 21C); • a franchise LTO scenario only (section 21D). The Department's view is that no change is required to these provisions in the Bill as: • the drafting of sections 21C and 21D is clear and reflects the above policy intent. It is not intended to provide for compliance with the lessor disclosure obligation for a licence to occupy that is not a franchise LTO;

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'franchisor' in the *Franchising Code of Conduct 2014* (FCC); • the reference in section 21D(1)(b) to 'wholly or predominantly for the carrying on of a retail business' should be removed as it is inconsistent with the section 5A definition of *retail shop lease*. (QLS recommendation 2)	• for the QLS' specific concerns on the drafting of section 21D - the FCC definition of 'franchisor' is not necessary or appropriate for the limited purpose of the section; and the section is not intended to apply to a licence to occupy granted by a franchisor for a non-retail franchised business. However, QLS recommendation 2 will be referred for consideration by the drafter.
Clause 15: New section 21F (Lessor's failure to comply with the disclosure obligation)	
The QLS does not support new objection and dispute provisions in sections 21F(5) to (9) and recommends that that they be removed (objection/dispute provisions). The QLS submits that the objection/dispute provisions would result in tenants being left in an untenable position pending resolution by the Queensland Civil and Administrative Tribunal (QCAT). QLS considers that, in many cases, the giving of an objection notice by the landlord will oblige the tenant to proceed with fitting the premises and payment of rent under the lease and (once that is done) the tenant would have no option commercially but to proceed with the lease regardless of QCAT's determination. The QLS also raises concern that the provision does not expressly provide for (in the case of a determination by QCAT that the tenant is entitled to terminate the lease): when the termination would take effect; or the tenant's liability for rent and fitout expenses during the period between the giving of the termination notice and the determination.	This submission is new and was not raised by the QLS in consultation on this Bill. The Department notes that the objection/dispute provision was inserted into the lapsed Retail Shop Leases Amendment Bill 2014 in response to concern raised by QLS about current section 22(5) of the Act. Section 22(5) provides that a tenant is not entitled to terminate the lease on the ground that a landlord disclosure statement is defective if the landlord acted honestly and reasonably and ought reasonably be excused for giving the defective statement, and the tenant is in substantially as good as a position as the tenant would have been if the disclosure statement were not a defective statement. The QLS submitted that section 22(5) of the Act "is not workable in practice. A lessee with a defective statement needs to know whether they have a right to terminate. If they terminate and a court or tribunal subsequently determines that (unbeknown to the tenant) the landlord had a reasonable excuse, the tenant has wrongfully terminated the lease and is liable to damages." The objection/dispute provisions (which are based on an equivalent provision in the Victorian retail leasing legislation) are intended to ensure the practical efficacy of a tenant's entitlement to terminate for effective disclosure, narrow termination disputes, and reduce the likelihood of a subsequent determination by QCAT as to wrongful termination by the tenant. The QLS' concerns will be considered in further consultation with key stakeholders

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Clause 16 : Amendment of section 22B (Assignor's and prospective assignee's disclosure obligations to each other)	
Clause 16 amends section 22B(1) of the Act to insert a new requirement that, where an assignment of lease relates to the sale of a retail business, the seller/outgoing tenant (assignor) must give the purchaser/incoming tenant (assignee) an assignor disclosure statement in the approved form. The assignor disclosure statement must be given to the assignee at least 7 days before the day on which the assignee enters into the business sale contract (sale contract). The QLS supports the amendment to require disclosure by the assignor before the assignee enters into the sale contract but submits that: • the 7 day assignor disclosure period is overly restrictive and likely to make it much harder for a small business owner to sell their business; • it is sufficient to require that the disclosure statement is given before the sale contract is entered into, such as pre-contract seller disclosure under the *Body Corporate and Community Management Act 1997* (BCCM Act); • there should at least be an ability to waive the 7 day assignor disclosure period, but a waiver would impose unnecessary additional red tape. The QLS recommends that clause 16 of the Bill be amended to: • remove the 7 day disclosure period for new section 22B(1)(a) (QLS recommendation 4(a)); or • include a waiver provision consistent with clause 15 new section 21B of the Bill (QLS recommendation 4(b)).	The assignor disclosure statement contains key beneficial information for an assignee in assessing the business investment viability/risks of entering into a contract to purchase the assignor's retail business operated from the leased premises. This includes information about the options under the lease, rent/outgoings liabilities, rent review provisions and sales history/trading performance of the business for the last 5 years. The 7 day assignor disclosure period in clause 16 new section 22B(1)(a) of the Bill (which aligns with the lessor disclosure period in section 21B) is intended to safeguard unsophisticated small business operators (who are prospective assignees) by ensuring a reasonable minimum period for the assignee to consider and receive appropriate advice on the information in the assignor disclosure statement before signing a sale contract that binds them to take an assignment of the lease. The reference group (other than the QLS) support, or did not oppose, the 7 day assignor disclosure period. In particular, this period was agreed as a measure to address key tenant stakeholder concern for increased transparency in the context of distressed business sales (see items 5.3.1 and 5.3.2 of the reference group report dated December 2013). QLS supported option B of item 5.3.1 in the reference group report - that the Act be amended to require the assignor disclosure statement to be given 'before entry into the sale contract' and to give the assignee a right to terminate the sale contract if the assignor disclosure statement is not given at that time (QLS proposal). The QLS proposal appears to have been based on the pre-contract seller disclosure provision under the BCCM Act. The reference group majority did not support (and key legal and industry stakeholders strongly opposed) the QLS proposal. The Department's view is that a provision for termination of a business sale contract is beyond the scope of the Act and that QLS recommendation 4(a) to the Committee would not adequately safeguard prospective assignees, including in relation to distressed business sales.

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	For QLS recommendation 4(b), enabling waiver of the 7 day assignor disclosure period is not considered appropriate given the context and tenant safeguard intent of new section 22B(1)(a). As the information in the assignor disclosure statement would be within the direct knowledge of the assignor as the existing business owner, the basis for the QLS submission that a 7 day assignor period is likely to make it much harder for a small business owner to sell their business statement is not clear.
Clause 32: Replacement of section 37 (Requirements when lessee to pay lessor's outgoings)	
The QLS recommends that "any disputes under section 37 (as amended) are considered to be 'a retail tenancy dispute' that may be determined by QCAT and that section 37(1)(b)(iii) be deleted". (QLS recommendation 3)	The QLS submission on clause 32 and QLS recommendation 3 are not clear. In response, the Department notes that: • clause 32 of the Bill clarifies/updates the drafting (but does not change the operation or intent) of current section 37(2) of the Act; • the Bill does not change the existing broad definition of *retail tenancy dispute* for the purposes of the Act (see Schedule 1 of Act); • the Bill does not change existing section 103(2)(b), which provides that QCAT has jurisdiction to hear a retail tenancy dispute about 'the basis on which the lessor's outgoings are payable by, and the procedure for charging the lessor's outgoings to, a lessee under a retail shop lease, but not the actual amount of the outgoings' • existing section 38 of the Act sets out the basis on which a landlord's outgoings for a retail shopping centre or leased building must be apportioned. Clause 33 of the Bill amends section 38 to clarify the existing formula; • neither the Bill or the current Act contain a section 37(1)(b)(iii).
Clause 33: New section 38B (Audited annual statement of outgoings)	
New section 38B(8) states: 'If a person becomes the owner of a retail shopping centre, or building containing a retail shop, the first audited annual statement given by the person may be made for a period of less than 1 year.' The QLS:	Clause 33 of the Bill inserts new section 38B, which updates and clarifies the existing requirement under section 37 of the Act for a landlord to give the tenant an audited annual statement of outgoings within three months after the period to which the outgoings relate.

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• submits that the drafting of new section 38B(8) is defective as it is not clear that: the purchaser is required to provide audited statements from the date it became owner to the end of the financial year; and that the previous owner is required to provide an audited statement up to the date that it ceased to be owner; and • recommends that new section 38B be amended to include provision for a previous owner to provide an audited statement to the date it ceased to be owner within 90 days of settlement (QLS recommendation 6).	New section 38B(8) reinstates existing section 37(6) of the Act, without change. This provision applies where a landlord sells the centre/ building in which the leased premises are located. The QLS submission and QLS recommendation 6 are new and were not raised by the QLS (or any other stakeholder) during the review consultation processes, or in consultation on the draft Bill. The reference group (which included the QLS) considered section 37(6) of the Act and (by consensus) recommended no change to the provision. In practice, it is a commercial matter for the previous owner and the new owner of a centre/building to make arrangements between themselves as to how the annual outgoings audit will be completed and what information will be provided by each party to allow the new owner to fulfil its obligations under the Act. It is not practicable or appropriate to regulate these matters, including to allow commercial flexibility on a case by case basis. A tenant who does not receive the complete audited annual statement of outgoings for the year has recourse under the dispute resolution provisions of the Act.
Assistant Professor Tammy Johnson, Faculty of Law Bond University	
Professor Johnson does not support the **non-retail lease exclusion in clause 5** (new section 5A(3). Professor Johnson submits that the non-retail lease exclusion (to the extent it would apply to small-scale commercial tenants whose leased premises are located in a retail shopping centre) is inequitable and contrary to the initial impetus for introduction of the Act (i.e. to remedy disproportionate bargaining power between large-scale shopping centre landlords and small-scale tenants) and the "consumer protection focus" of the Act. Professor Johnson instead proposes an additional exemption category for banking institutions.	The issues raised by Professor Johnson at item 3.2 of her submission with respect to the non-retail lease exclusion in the Bill were considered in the review consultation process and, in particular, by the reference group under its terms of reference. It should be noted that the non-retail lease exclusion in clause 5 of this Bill (which is supported by the reference group and will be prospective in effect) only excludes non-retail leases in the particular areas of a retail shopping centre specified in new section 5A(3)(b). That is, the Bill does not remove statutory protection for non-retail leases situated in the main retail area of a shopping centre (c.f. for example, an office tower located above the main retail areas, or a stand-alone medical centre in the car park of a major shopping centre complex).