



Government of Western Australia  
Department of Commerce

# CONSULTATION

REGULATORY IMPACT STATEMENT

*Commercial Tenancy (Retail Shops) Agreements Act 1985*

## OPTIONS FOR IMPROVING ACCESS TO LEASE INFORMATION IN THE RETAIL TENANCY MARKET IN WESTERN AUSTRALIA

JULY 2011



# OPTIONS FOR IMPROVING ACCESS TO LEASE INFORMATION IN THE RETAIL TENANCY MARKET IN WESTERN AUSTRALIA

## CONSULTATION PAPER

Prepared by the Department of Commerce  
July 2011

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This Consultation Regulatory Impact Statement (Consultation RIS) has been prepared in compliance with the Western Australian Government's requirement for Regulatory Impact Assessment and to facilitate public consultation on the proposed options for improving access to lease information in the retail tenancy market in Western Australia.

Comments and submissions are invited on the proposals outlined in this Consultation RIS. Written comments, queries and submissions should be forwarded no later than close of business on **19 August 2011**.

Please direct all comments, queries and submissions to:

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## 1 EXECUTIVE SUMMARY

The information imbalance that often exists between landlords and tenants in lease negotiations is a common issue raised by retail tenants and tenant organisations. This issue has been the subject of consideration at both the national level by the Productivity Commission<sup>1</sup> and at the State level by a Review Committee<sup>2</sup>.

During the course of the various reviews and consultations, industry participants have made a number of suggestions to redress this information asymmetry.

This Consultation RIS outlines four options for improving access to lease information about retail shops under the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (Commercial Tenancy Act).

The four options are:

- extend valuers' access to lease information;
- establish a public lease register;
- compulsory registration of leases on land title; and
- status quo.

### 1.1 Purpose of consultation

Whilst there appears to be a need to improve access to rental information in the retail tenancy market, consideration must also be given to any adverse consequences or costs (direct or indirect) that any reform may impose on the industry, so as to ensure that any potential disadvantages of the reform do not outweigh the benefits.

In Western Australia, regulatory impact assessment requirements apply to policy proposals for new and amending legislation that may have a significant negative impact on business, consumers, government or the economy.

The Regulatory Gatekeeping Unit requires the development of a regulatory impact statement for consultation purposes and to inform decision making.

This paper therefore constitutes a Consultation RIS and it includes a preliminary assessment of the likely costs of implementing each of the above options. It also seeks to obtain feedback from affected parties on the options and impacts and to ensure that the options presented to the Government are accurate and confirmed by industry. Views received as a result of this consultation will be considered in the final recommendations presented to the Government.

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<sup>1</sup> Productivity Commission 2008, *The Market for Retail Tenancy Leases in Australia*, Inquiry Report no 43, Canberra (Productivity Commission Report) / [www.pc.gov.au/projects/inquiry/retailtenancies](http://www.pc.gov.au/projects/inquiry/retailtenancies)

<sup>2</sup> Review of the Commercial Tenancy (Retail Shops) Agreement Act 2003 (Review Committee Report)

## 2 STATEMENT OF THE ISSUE

In recent reviews of retail tenancy legislation in Western Australia and nationally, concerns have been raised about the lack of access to meaningful information about leases by participants in the market, particularly tenants<sup>3</sup>. Evidence provided to those reviews indicates that some landlords, agents and tenants are not prepared to provide information on the terms of rentals of retail shops.

It has been suggested that this lack of access to rental information can hamper efficient decision making by tenants.<sup>4</sup> In particular, without access to information on comparable rents, tenants and valuers may be unable to determine what constitutes fair market rent for a particular retail shop.

It has also been argued that valuers preparing valuation reports for tenants under the Commercial Tenancy Act are often frustrated by the lack of access to meaningful data and are unable to present to the Commercial Tribunal (now replaced by the State Administration Tribunal - SAT) valuation reports which will stand up to scrutiny<sup>5</sup>.

### 2.1 Context of the Issue

#### 2.1.1 *The Commercial Tenancy Act*

The Commercial Tenancy Act regulates commercial tenancy agreements in relation to particular types of premises, namely retail shops.

The Act provides that a retail shop includes:

- any premises in a retail shopping centre used for the carrying on of a business; and
- any premises used wholly or predominantly for the carrying on of a retail business or a specified business.

A retail shopping centre is defined as a cluster of premises, at least five of which are used wholly or predominantly for a retail business.

The Commercial Tenancy Act provides protections to tenants under a retail shop lease. Currently, this is a lease that provides for the occupation of a retail shop; unless the premises has a floor area in excess of 1,000 square metres or the tenant is a public company<sup>6</sup>.

In 2003, a Review Committee undertook a review of the Commercial Tenancy Act and made a number of recommendations for reform. A number of these recommendations have been addressed in a Bill (currently before Parliament) which seeks to amend the Commercial Tenancy Act<sup>7</sup> to address a number of deficiencies in the legislation and to strengthen the protections for small business. The issue of increasing access to lease information is not

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<sup>3</sup> Review Committee Report

Productivity Commission Report

<sup>4</sup> Productivity Commission Report – page 174

<sup>5</sup> Review Committee Report – page 96

<sup>6</sup> Amendments to the *Commercial Tenancy (Retail Shops) Agreements Bill 2011* made in the Legislative Council will, if implemented, include within the definition of 'retail shop lease' premises with a floor area in excess of 1000 square metres and leases to public companies. At the date of release of this paper the final form of the Bill had not been resolved by the Parliament.

<sup>7</sup> *The Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011*

addressed in the Bill except to a limited extent as outlined in 2.1.3 below. The Government determined that given the complexity of this issue, further consultation is required. In September 2010, the Government undertook consultation in relation to one particular option for increasing access to lease information. Further details on this consultation and the Bill are provided below.

### **2.1.2 Previous consultation on the issue – register maintained by shopping centre landlords**

In September 2010, the Government released a Position Paper (2010 Position Paper) which outlined a proposal to include a requirement in the Commercial Tenancy Act that landlords in retail shopping centres maintain a register of relevant lease details for all retail shops in a retail shopping centre.

It was proposed that the particulars to be included in the registers would be prescribed by regulation.

Access to the registers would be limited to other tenants in the shopping centre, bona fide potential tenants, and valuers appointed by those tenants or prospective tenants. A confidentiality provision would also be included in the Commercial Tenancy Act. The requirement to maintain a lease register would be enforced by the inclusion of a penalty provision in the Act.

Analysis of the submissions received, indicated that there was limited support for the model proposed in the 2010 Position Paper. Therefore, the Government does not intend to progress with this particular model.

Key concerns raised by stakeholders in relation to the model proposed in the 2010 Position Paper include:

- confidentiality concerns about commercially sensitive information becoming available and difficulties in preventing misuse of such information;
- difficulties in establishing whether a person is a potential bona fide tenant - this could be impractical and prone to abuse;
- access difficulties – there could be difficulties in providing access to a register if centre management is located off site or if tenants or their representatives are located interstate;
- concerns about the proposed level of access – some stakeholders were of the view that the proposal provided too much access, others that it was too restrictive and should be extended, for example to solicitors and lease information providers;
- concerns about the information available – some stakeholders were of the view that the proposal would provide access to too much information, others said that the proposal does not provide access to enough relevant information and that tenants need access to lease information across a broad range of locations rather than just one shopping centre;
- concerns about the administrative costs imposed on landlords in relation to the creation, maintenance and provision of access to shopping centre registers – with a number of stakeholders predicting that these costs would be passed on to tenants;

- concerns about the currency and relevance of information – a number of stakeholders were of the view that information could be misconstrued if not assessed in the appropriate context;
- difficulties in ensuring compliance - particularly given that there are currently no penalty provisions in the Commercial Tenancy Act, penalty provisions would be likely to be required, compliance costs would be incurred and a government authority would be required to monitor compliance;
- concerns that introduction of shopping centre registers could cause tension between tenants, particularly if some tenants have secured commercially advantageous lease arrangements; and
- concerns that the proposal could result in an increase in disputes between landlords and tenants.

A number of stakeholders indicated some support for the alternate options outlined in the 2010 Position Paper and for other alternate options. However, the submissions did not reveal clear support for one particular model.

It should also be noted that some stakeholders opposed the introduction of any lease register requirements into the Commercial Tenancy Act.

### **2.1.3 Proposed changes to the Commercial Tenancy Act**

In its 2003 Report on the Review of the Commercial Tenancy Act, the Review Committee recommended that a provision be included in the Act that, on request, a valuer appointed by either the landlord or the tenant to determine the market rent for a retail shop at the time of a market rent review, be supplied with all relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the rent<sup>8</sup>.

To implement this recommendation, the Government has introduced a Bill<sup>9</sup> (the Commercial Tenancy Bill) that includes a provision to amend the Commercial Tenancy Act to provide that, in the event the parties to a lease are unable to reach an agreement as to market rent at review and have appointed a licensed valuer under Section 11 of the Commercial Tenancy Act, a landlord must provide the following information to the valuer, about leases for retail shops in the same building or retail shopping centre:

- current rental for each lease;
- rent free periods or any other form of incentive;
- recent or proposed variations of any lease;
- outgoings for each lease; and
- any other information prescribed in the regulations.

Under the proposed amendment, if the landlord fails to provide the relevant information, the tenant may make an application to the State Administrative Tribunal for an order that the landlord comply with the request for information.

<sup>8</sup> Review Committee Report - Recommendation 30 – page 96

<sup>9</sup> See the *Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011* introduced into the Legislative Assembly on 16 March 2011.

A provision was included in the Commercial Tenancy Bill, as introduced by the Government, to ensure that any information provided to the valuer would remain confidential and could only be disclosed in certain limited circumstances. Amendments were made to the Bill in the Legislative Council to remove most of the proposed provision and provide that, with the exception of any information relating to turnover, any information provided to valuers is not to be regarded as confidential. At the time of release of this Consultation RIS, the final form of the amendment had not been resolved by the Parliament.

#### **2.1.4 Limits to proposed amendments**

While the proposed amendments to the Commercial Tenancy Act will ensure that valuers have improved access to lease information, it is important to note that this information will only be provided to valuers appointed by the landlord and/or tenant who are undertaking a market review of the rental for particular retail shop premises during the term of the lease<sup>10</sup>.

Market participants have called for access to information more broadly, so that tenants (as well as valuers) can assess lease information prior to entry into a lease and at other times, not just on a market review of rental.

### **3 OBJECTIVES**

The policy objective is to develop and implement the most appropriate reform for increasing access to lease information in the retail tenancy market in Western Australia, having regard to the costs and benefits of each option.

### **4 OPTIONS TO ADDRESS THE ISSUE**

As outlined above, stakeholders have identified three possible options for addressing the issue of information asymmetry in the retail tenancy market. Each of these options is outlined and considered below. Also included for consideration and feedback, is the option of maintaining the status-quo and not implementing any proposal for reform to address the issue.

#### **4.1 Option One - increase valuer access to information**

Require landlords to provide specified lease information to valuers (appointed by tenants) prior to the commencement of a lease or at any other time.

##### **4.1.1 Background**

As indicated in section 2.1.3 above, the Commercial Tenancy Bill contains a proposed amendment which will insert a new provision in the Commercial Tenancy Act to provide that in the event the parties to a lease are unable to reach an agreement as to market rent and have appointed a licensed valuer, a landlord must provide specified information to the valuer about leases for retail shops in the same building or retail shopping centre.

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<sup>10</sup> See section 11 of the Commercial Tenancy Act.



During consultation on the 2010 Position Paper, some market participants indicated support for broadening the scope of this proposed amendment to also require landlords to provide the specified information to valuers at other times, such as the commencement of the lease, and not just at the time of a market rent review.

Broadening the scope of the proposed amendment in this way, means that any confidentiality provisions included in the Commercial Tenancy Bill<sup>11</sup>, and the new enforcement provisions (which allow a tenant to seek an order from the SAT to compel the landlord to provide the requested information), would also apply.

It has been suggested that this option may assist tenants in determining whether to enter into a lease and improve their bargaining power when negotiating the terms of the lease.

## **4.2 Option Two – Public Lease Register**

Creation of a publicly accessible, electronically based, centralised lease register. Registration requirements would apply to all retail shops and not just those located in shopping centres.

The Commercial Tenancy Act could be amended to provide that, following execution of a retail shop lease, the landlord must lodge a summary of certain details with a central body (likely to be a government authority), including:

- the address of the retail premises;
- the name and address of the landlord and tenant;
- the lettable area of the premises;
- the annual rental for the premises (per square metre); and
- such other matters as are prescribed.

Matters that might be prescribed include:

- the manner in which operating expenses are determined (for example - is the lease gross, semi-gross or are operating expenses allocated based on proportion of lettable area);
- the frequency and method of rental review;
- the nature of the retail business; and
- whether the premises are located in a shopping centre and, if so, the size of the centre.

The name and address of the tenant and landlord could remain confidential, with the other details being made available publicly. A capacity for lodging and accessing information on-line would need to be available.

Stakeholders have suggested that:

- a public register could be designed to cover its own costs, with a fee payable for access;

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<sup>11</sup> At the time of release of this Consultation RIS it was unclear as to whether confidentiality provisions would remain in the Commercial Tenancy Bill – see commentary at section 2.1.3

- information in the public register database could be aggregated to alleviate confidentiality concerns of landlords and tenants; and
- access to such a register could be regulated with layered levels of security clearance, so that approved persons have access to more information than others.

If a decision is made to implement this option, the Government will examine the possibility of utilising existing information systems within Government in establishing the lease information database.

#### 4.2.1 Background

In order to address concerns about access to lease information, the Review Committee recommended that Government examine the option of establishing a public lease register that records and provides all relevant lease information<sup>12</sup>. The Review Committee did not identify what this lease information should be.

In addition, the Productivity Commission has made the following recommendation:

*To increase the transparency of the market, State and Territory governments should, as soon as practicable, facilitate the lodgement by market participants of a standard one page lease summary at a publicly accessible site<sup>13</sup>.*

Key lease terms would be included in the summary, including rent, outgoings and other key statistics<sup>14</sup>. The Productivity Commission was of the view that lodgement of the summary should be voluntary rather than mandatory.

#### 4.2.2 Productivity Commission's view

The Productivity Commission recommended that market participants should lodge a standard one page lease summary at a publicly accessible site.<sup>15</sup> In its Inquiry Report, the Productivity Commission states:

*..the Commission accepts that lodgement of lease information with an independent agency would potentially enable public searches of leases and increase information on the retail tenancy market. Additional information on the market could improve the decision making of smaller tenants or boost their confidence in lease negotiations, for a low additional cost. Furthermore, to the extent that lease information is able to be lodged, lodgement would potentially provide a source of information for use in market valuations. The Commission considers that lodged lease information should not necessarily include information on incentives and 'side deals'. Such a requirement would be difficult to enforce and would not significantly add to market information<sup>16</sup>.*

This option, if implemented would be broadly consistent with the Productivity Commission's recommendation.

<sup>12</sup> Review Committee Report - Recommendation 31 – page 96

<sup>13</sup> Productivity Commission Report - Page xxx

<sup>14</sup> Productivity Commission Report – Page 181

<sup>15</sup> Productivity Commission Report – page 253

<sup>16</sup> Productivity Commission Report – page 253

### 4.3 Option three – Mandatory registration on land title

The Commercial Tenancy Act could be amended to provide that all retail shop leases must be legally registered on the land title.

#### 4.3.1 Background

Currently, under the *Transfer of Land Act 1893* (TLA) in Western Australia, a lease with a term of more than three years may be registered on the certificate of title of the commercial property the subject of the lease. Registration in this sense is done to protect the interests of a lessee (particularly in relation to options to renew) against others claiming an interest in the title to the land, such as a mortgagee or subsequent purchaser. Tenants generally pay the costs of registering a lease on the title (\$160), with landlords assuming responsibility for actually registering the lease documents.

A by-product of lease registration on the title is improved access to market information, as searches may be conducted of any documents registered on the title. The current cost to undertake a search of a document on a title is \$24 per search.

All other States also allow for registration of a lease on the land title. It should be noted that some jurisdictions require that a lease must be for a minimum term (such as three years) before it can be registered. Registration on the title is voluntary in all jurisdictions.<sup>17</sup>

Only a limited number of leases are currently registered in Western Australia compared to other jurisdictions, thus resulting in limited access to lease information. Registration is much more common in jurisdictions such as New South Wales and Queensland, thus resulting in greater availability of lease information in those States.

There are legislative differences in other Australian jurisdictions that make registration on title necessary for protecting the proprietary interests of lessees in those jurisdictions. Western Australia provides greater protection for tenants of unregistered leases with a term of up to five years so that it is often unnecessary for such leases to be registered. In addition, lessees in Western Australia can protect their interests by lodging a caveat instead of registering the lease on the title.

#### 4.3.2 Productivity Commission's view

In its 2008 Inquiry the Productivity Commission acknowledged “gaps” in availability of lease information and examined the option of mandating lease registration (on the title) to improve market information. The Productivity Commission concluded that compulsory registration on the title could not be justified.

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<sup>17</sup> It should be noted that in January 2011 the former NSW Government released an exposure draft of a Bill to amend the *Retail Leases Act 1994* (NSW) – the exposure draft includes an amendment which would require registration on the title of all leases with a term of three years or more and would also require registration of a summary statement for the lease. At the time of release of this paper, the current NSW Government had not progressed the Bill.

Its Inquiry Report states:

*The fact that not all leases are registered, however, suggests that the value that some parties place on increased legal security is outweighed by other factors such as the cost of registration and commercial confidentiality. Indeed, the information benefits created to an individual tenant from registering their lease are likely to be well below the collective benefit to all tenants (as they already know the terms and conditions of their own lease). Thus, compulsory registration could only be justified if the overall information benefit from doing so exceeded the cost, and was determined to outweigh considerations of commercial confidentiality.*

*Additional requirements for mandatory lease registration would increase both compliance costs and the cost to government of regulation. For example, in all States and Territories, lessors and lessees can register leases to legally validate claims on real property. Thus, introducing legislative requirements for this to occur is likely to be unwarranted (indeed, the provisions currently available to protect legal rights can already be viewed as the minimum necessary). Also, the mandatory registration of retail tenancy leases would invalidate any confidentiality provisions that have been included in contracts, limiting businesses' freedom to contract.<sup>18</sup>*

Despite the Productivity Commission's view on mandatory lease registration, this option has been included in this consultation document, as various stakeholders have indicated their support for mandatory lease registration. It is anticipated that feedback received on this option, will further inform the Government of the issues and benefits of this particular option for reform.

#### **4.4 Option four - maintain status quo**

There are concerns that the costs of implementing and complying with the above options to improve access to lease information may outweigh the benefits. Consequently, another option is to maintain the status quo and not implement any reform aimed at improving information transparency and accessibility.

## **5 IMPACT ANALYSIS**

The above options have the potential to impact on industry participants as well as the retail tenancy market as a whole. These impacts are described and analysed below.

### **5.1 Impact on market function and competition**

Implementation of any of the first three options will impose requirements aimed at improving the availability of information. It is anticipated that each of the options will improve competition in the retail leasing sector by improving access to market information. To this end, it is not anticipated that any of the options will have a negative impact on the ability of businesses to compete in the market or the range of businesses which have access to the market.

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18 Productivity Commission Report page 177

## **5.2 Impact on costs for market participants**

### **5.2.1 Option one: Extend valuer access to information**

Some costs will be incurred by landlords in maintaining records in relation to a shopping centre and providing access to that information on request. However, these costs are likely to be minimal as landlords are likely to already maintain records of the relevant lease details.

It is not possible to quantify the potential costs as they will vary depending on factors such as:

- the size of the shopping centre;
- whether there is dedicated centre management;
- the current practices of the landlord with regards to data management; and
- the potential number of parties seeking access to the information.

Tenants will also incur additional costs in engaging a valuer to obtain and analyse the rental information. Costs will vary according to how much information is examined by the valuer. The *Land Valuers Licensing (Remuneration) Notice 2010* caps a valuers remuneration at \$385 per hour or an amount determined by reference to the annual rental of the property (starting at \$2,375). In some circumstances, more experienced valuers may charge up to \$519.75 per hour with the approval of the client.

### **5.2.2 Option two: Public lease register**

Some costs will be imposed on landlords in relation to:

- the lodging of relevant information;
- educating themselves as to their new obligations (some landlords may seek legal advice);
- extracting the relevant information from their records; and
- if landlords are required to provide a one page summary of lease details, landlords may need to update their systems to enable them to provide the information in this form.

Landlords will also incur additional, ongoing costs if they are required to update the register to include information in relation to any variation, assignment or renewal of the lease.

Costs will be incurred by tenants and other businesses accessing information from the register.

### **5.2.3 Option three: Mandatory registration on the title**

Registration fees are likely to be imposed on tenants. At present the registration fee is \$160. Additional costs could also be incurred in relation to preparation of documents and the production of the title (if required).

Landlords will incur some administrative costs in arranging for registration of leases on the title. Landgate registration requirements must be complied with. These requirements can sometimes be complex, particularly if plans are required.

Costs will be incurred by tenants and other businesses in undertaking land titles searches of relevant documents. There may also be additional costs to Landgate arising from a higher volume of users.

#### **5.2.4 Option four: maintain status quo**

The potential cost implications of this option are largely indirect and difficult to measure. It is likely that the costs associated with maintaining the status quo will arise where the issue of information asymmetry results in disputation between the parties and the parties to a lease agreement and government agencies (such as the SAT) incur costs in resolving those disputes.

### **Benefits and disadvantages of Options**

#### **5.2.5 Option one: Extend valuer access to information**

There are a number of possible advantages of this option:

- access would be provided at all times, not just on a market review of rental, thus creating greater transparency of lease information for tenants – this would be of particular use to tenants during negotiations prior to commencement of a lease;
- arguably, a valuer has the knowledge and skills to properly analyse and compare various lease terms – this would mean that the information is assessed in the appropriate context;
- confidentiality concerns may be addressed to some degree as the information would only be provided to a licensed valuer;
- licensed valuers are required to comply with a code of conduct that imposes certain standards of efficacy and honesty on valuers;
- it is a relatively low cost proposal to establish – landlords will already have the relevant information and there would be few costs associated with maintaining records and providing access to such information on request; and
- the proposal would utilise the compliance mechanisms to be included in the Commercial Tenancy Act by the current proposed amendments – the tenant will be able to seek an order from the SAT to compel the landlord to provide the requested information.

There are also a number of potential disadvantages with this option:

- costs to tenants in appointing a valuer – this cost could be particularly onerous if a tenant is looking at a variety of premises and the valuer is required to analyse lease information from various centres<sup>19</sup>;
- the proposal would only apply to shopping centres or groups of shops located in the same building – it would not apply to shops with street frontage (strip shops) or single shops;

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<sup>19</sup> The *Land Valuers Licensing (Remuneration) Notice 2010* made under the *Land Valuers Licensing Act 1978* caps a valuers remuneration at \$385 per hour or an amount determined by reference to the annual rental of the property (starting at \$2,375). More experienced valuers may charge up to \$519.75 per hour with the approval of the client.

- the information available may be limited to the particular shopping centre(s) in which the tenant is considering renting a retail shop, and tenants may not be able to compare information across other shopping centres or in relation to premises located outside of the particular shopping centre(s);
- landlords may have concerns about assessing whether a person is a bona fide potential tenant before providing the information – however, it is likely that, in most instances, only genuine potential tenants would be willing to pay the costs of appointing a valuer; and
- landlords will incur some costs in providing the information to valuers.

### **5.2.6 Option two: public lease register**

The Review Committee was of the view that a public lease register in Western Australia would:

- provide economical, readily accessible lease information to landlords, tenants, valuers and others in the industry;
- enable improved access to market rents and other lease details which would contribute to a more open and informed market; and
- redress the information imbalance that currently exists, result in fewer disputes, and contribute towards more constructive relationships between landlords and tenants<sup>20</sup>.

Other potential benefits of this model include:

- information will be centrally available in relation to all retail shops, regardless of location, thus providing tenants and other market participants with access to information about the whole retail tenancy market;
- confidentiality could be maintained to some degree by keeping the details of the landlord and tenant confidential;
- the cost of undertaking searches is likely to be lower than the costs associated with appointing a valuer or undertaking extensive searches of the land title (this will vary depending on the number of searches undertaken);
- it is arguable that the administrative burden on landlords will be lower, as they will not be required to maintain a register or keep updated records; and
- it may be possible to utilise existing Government land information management systems in establishing the register.

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<sup>20</sup> Review Committee Report - Page 98

Potential concerns raised by stakeholders in relation to the proposal to establish a public lease register, include:

- concerns about confidentiality - commercially sensitive information will be broadly available on a public register (although these concerns could be addressed to some extent by aggregating the information);
- the costs in establishing an appropriate database could be significant;
- costs involved in conducting searches, particularly multiple searches, of the register;
- difficulties in keeping the register up to date, given the number of variations, renewals and assignments of leases occurring in the market;
- an administrative burden and associated additional costs will be imposed on landlords in registering lease information (these costs could potentially be passed to tenants);
- difficulties in ensuring that information can be used appropriately and users are not misled – there may not be any value in comparing rents across different shopping centres, as a number of other variables (such as incentives, location, tenant mix, different turnover figures and varying operating hours) also need to be taken into account to ensure that the comparison is meaningful and not misleading; and
- there may be some difficulties in ensuring compliance, particularly given that there are currently no penalty provisions in the Commercial Tenancy Act - penalty provisions are likely to be required, compliance costs would be incurred and a government authority would be required to monitor compliance.

### **5.2.7 Option three: registration on title**

Potential benefits of this option include:

- increased availability of lease information in relation to all retail shops;
- land title system is already in place at Landgate to facilitate registration;
- improved accuracy and capacity to monitor compliance;
- will provide some degree of confidentiality, as the costs of undertaking multiple searches will deter some persons from accessing information for improper purposes; and
- will allow parties to assess lease information in context, as the whole lease agreement will be registered and accessible.

The potential disadvantages for this proposal include:

- the current provisions of the TLA only allow for registration of leases with a term of three years or more. Many retail shop leases are for a shorter term, with a number of options to renew (for example, a lease may be for an initial term of one year with two options to renew for two years each). This means that not all retail shop leases are currently registrable under the TLA and, unless the TLA is amended, lease information would be incomplete;



- the process of registration can be complex (especially if land surveys are required) and is likely to result in increased costs for tenants – tenants are usually required to pay the costs of registration. Costs will also be incurred in removing a lease from the title upon expiry of the term;
- an administrative burden will be imposed on landlords to effect registration of leases on the land title;
- the cost of conducting searches (currently \$19 - \$24 each lease) could be prohibitive, particularly if a tenant wishes to assess a broad range of lease information – that is, a tenant would be required to obtain a search of the certificate of title, identify the leases on the title that are relevant and then obtain searches for each of those leases;
- once a copy of a particular lease document is accessed, tenants (or their representatives) would be required to extract any relevant information from that document, this could be time consuming and difficult for less sophisticated parties;
- sometimes the whole agreement between the parties is not just contained in the lease document itself but also in side-agreements, letters, e-mails and other correspondence – therefore the lease document may not contain all of the lease terms;
- it will be difficult to maintain the currency of the information – leases are registered following execution by the parties, however, changes in rental values (often annual) and other variations to a lease may not be registered or accessible with the original lease document;
- there may be some difficulties in ensuring compliance, particularly given that there are currently no penalty provisions in the Commercial Tenancy Act - penalty provisions are likely to be required, compliance costs would be incurred and a government authority would be required to monitor compliance; and
- there would be resource requirements for government in establishing and maintaining the database.

#### **5.2.8 Option four: maintain status quo**

The benefits of this option are that that no direct additional costs would be incurred by industry or the Government. Maintaining the status quo would also eliminate the risks and possible adverse implications associated with the other options (as highlighted above).

The potential disadvantage of this option is that the current issues associated with the lack of accessibility of lease information would not be addressed. This in itself may have indirect cost implications for the industry and the Government in terms of costs associated with dispute resolution and a less efficient retail tenancy market.

## 5.3 Feedback on Options

### 5.3.1 Option one: extend valuer access to information

Your feedback is sought in relation to this option for reform. Specific issues you may want to consider and comment on include:

- (a) Do you support this option? Why?
- (b) Would the information available under this model be broad enough to improve tenants' decision making ability?
- (c) Should there be a requirement for persons to prove they are bona fide prospective tenants? If so, what criteria/test do you think should be used for determining whether a person is bona fide?
- (d) Should landlords be entitled to charge the tenant for their administrative costs incurred in providing the information to the valuer?
- (e) Is the requirement to disclose only through a valuer appropriate?
- (f) Should valuers be able to access information about leases from any landlord of a retail shop (even if the shop is not located in the relevant shopping centre)?
- (g) What would be the likely costs to landlords and/or tenants if this option were implemented?
- (h) As a tenant, would you be likely to hire a valuer if it was the only way of accessing lease information?
- (i) Would the benefits of this option outweigh any potential disadvantages for landlords and tenants or the retail tenancy market?
- (j) Can you provide an estimate of the paperwork (time taken), non-paperwork, financial and other costs of complying with this option?

### 5.3.2 Option two: public lease register

Your feedback is sought in relation to this option for reform. Specific issues you may want to consider and comment on, include:

- (a) Do you support this option? Why?
- (b) What information should be included on the register? Is the summary information referred to in section 4.2 above sufficient? Would the lease also need to be lodged in order to verify information?
- (c) Who should maintain the register (e.g. specific government agency)?
- (d) When should the information be updated?
- (e) Should the requirement to register the information apply to existing leases or just to new leases entered into after the introduction of this proposal?
- (f) Who should have access to the information? Should access be restricted in any way?
- (g) How should access to the information be provided, e.g. physical, online over the phone?

- (h) What would be the likely costs to landlords and/or tenants if this option were implemented?
- (i) Would the benefits of this option outweigh any potential disadvantages for landlords and tenants or the retail tenancy market?
- (j) Can you provide an estimate of the paperwork (time taken), non-paperwork, financial and other costs of complying with this option?
- (k) Should information that could identify landlords or tenants be excluded from the public database?

### 5.3.3 *Option three: registration on title*

Your feedback is sought in relation to this option for reform. Specific issues you may want to consider and comment on, include:

- (a) Do you support this option? Why?
- (b) If compulsory registration on title were implemented, should it apply only to leases of more than three years or would amendments to the *Transfer of Land Act 1893* (TLA) be justified to enable leases with terms of less than three years to be registered?
- (c) When should the information be updated? How could this be done?
- (d) Who should have access to the information? Should access be restricted in any way?
- (e) Who should pay the costs of registration on the title?
- (f) What would be the likely costs to landlords and/or tenants if this option were implemented?
- (g) Would the benefits of this option outweigh any potential disadvantages for landlords and tenants or the retail tenancy market?
- (h) Can you provide an estimate of the paperwork (time taken), non-paperwork, financial and other costs of complying with this option?

### 5.3.4 *Option four: maintain status quo*

Your feedback is sought in relation to this option. Specific issues you may want to consider and comment on, include:

- (a) Do you support this option? Why?
- (b) What are the potential cost implications of this option?
- (c) Would the benefits of this option outweigh any potential disadvantages for landlords and tenants or the retail tenancy market.

## 5.4 **Summary and comparison of costs**

Option one (extend valuer access to information) has the potential to impose the greatest cost for tenants. If tenants choose to seek access to lease information the tenant will be required to appoint a valuer. However, there will be no statutory requirement for a tenant to appoint a valuer (unless they wish to obtain the relevant lease information) tenants will, therefore, only incur additional costs if they elect to seek lease information. Government may incur some costs in relation to matters referred to the SAT.

Option two (public lease register) will impose some administrative costs on the landlord and potentially a cost associated with lodging information on a database. Tenants will also incur a search cost if they elect to search the register. It is anticipated that this search cost will be nominal (unless multiple searches are conducted). Option two will impose a cost on Government for establishing and maintaining the register, this may vary to the extent that current systems can be utilised. Government will also incur costs in relation to compliance.

Option three (mandatory registration on the title) will impose some administrative costs on both the landlord and the tenant related to registering the documents. Tenants will also incur search costs if they choose to search the register. Additional costs will be incurred by the tenant if they appoint a valuer or lawyer to assist in extracting and understanding the information. Whilst the land titles register already exists, there will still be some cost to Government in ensuring the existing register and legislation can accommodate for the compulsory registration of leases. Government will also incur costs in relation to compliance.

Option four (status quo) entails the current situation in respect to the costs of accessing retail lease information. In the Eastern States, tenants are able to access information from commercial providers of leasing information. Charges vary considerably depending on the degree of detail sought. However, as there is no statutory requirement for landlords to provide leasing information in Western Australia, these commercial information providers are not able to provide a service for Western Australian retailers to any significant degree. In the absence of reporting requirements, direct costs are likely to be negligible. However, it is probable that the significant, indirect, cost for landlords is the cost of disputation over retail leases. Costs for government are not significant as there are no statutory obligations about lease information which require compliance activity.

Below is an indicative summary of the potential cost impact on landlords, tenants and Government of each of the options for increasing access to retail lease information.

	<b>OPTION ONE Extend valuer access</b>	<b>OPTION TWO Public lease register</b>	<b>OPTION THREE Mandatory registration on title</b>	<b>OPTION FOUR Status quo</b>
Tenant	Medium-high	Low-medium	Medium-high	Low-Medium
Landlord	Medium-low	Medium	Medium - high	Low
Government	Low	High	Medium	Low

## 6 CONSULTATION

This Consultation RIS aims to gather information and feedback from industry participants on the options and their likely impacts.

Submissions are sought on the options and impacts outlined in this Consultation RIS, and on the following general and specific issues.

Please also feel free to provide feedback in relation to any other issues that you consider relevant to providing better access to lease information. Where possible, please provide reasons or examples to support your view.

## **6.1 Timeframe**

The deadline for lodging a submission is Friday, 19 August 2011. Once feedback from this consultation process has been compiled, a decision RIS will be finalised and recommendations will be presented to the Government on the preferred option.

## **7 IMPLEMENTATION AND EVALUATION STRATEGY**

### **7.1 Implementation**

Implementation of any of the options (except for option 4, status quo) will require the drafting, and enactment by Parliament of amendments to legislation, principally the *Commercial Tenancy (Retail Shops) Agreement Act 1985*. There may be a need for consequential amendment of other legislation, subject to advice on the option adopted.

Option 2 (Public Lease Register) will require the examination of existing government land information systems and developments/enhancements to accommodate a public lease register; and this may also be the case with the Option 3 (Mandatory registration on land title).

All options other than 'status quo' would require an education campaign prior to commencement with key stakeholders, including land valuers, landlords, and tenants.

### **7.2 Evaluation**

As the intent of the reforms proposed is to improve access to retail tenancy information, evaluation of the success of the reforms should focus on stakeholder satisfaction with access to such information. Options to ascertain such views could include a survey of stakeholders' opinions on the extent to which the reforms have improved access to information.

It would also be useful to assess the degree of take-up of whatever new system is implemented, for example the number of enquiries made of the public lease register, if that option is chosen.

Evaluation could not be effectively undertaken until stakeholders had had the opportunity to put any new system to the test, however it is unlikely that it would be necessary to wait for five years from the enactment of any legislative amendment, as is the case with standard review provisions in Western Australia legislation. Depending on the option adopted, it would be appropriate to undertake evaluation within a reasonable period of time, for example within 1-2 years of commencement.



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