



Government of **Western Australia**
Department of **Commerce**

DECISION REGULATORY IMPACT STATEMENT

**IMPROVING ACCESS TO LEASE
INFORMATION IN THE RETAIL
TENANCY MARKET IN
WESTERN AUSTRALIA**

OCTOBER 2014



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

DECISION REGULATORY IMPACT STATEMENT

Prepared by the Department of Commerce

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

Public comments and submissions were invited on the proposal, in response to information provided in a Consultation Regulatory Impact Statement (Consultation RIS) released by the Department of Commerce.

This DRIS was prepared in April 2012 for Government consideration. The Minister advised of Cabinet's support of the recommended option in Parliament on 19 August 2014.

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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 Commission¹ and at the State level by a Review Committee².

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

In July 2011, the State Government released a Consultation RIS which outlined four options for improving access to lease information about retail shops in Western Australia.

The four options are:

- maintain the status quo (Option A);
- increase valuers' access to lease information (Option B);
- establish a public lease register (electronic database of information) (Option C); and
- provide for compulsory registration of leases on land title (Option D).

In response to the Consultation RIS, 30 submissions were received from tenants, landlords, participants in the property industry, small business representatives and government.

There was limited support in the submissions for Option B. Support (and opposition) was fairly evenly divided across Options A, C and D. An analysis of the costs and benefits of each option is set out in Part 5 of this paper.

A key concern raised by a number of stakeholders is that increased access to lease information may not significantly improve the bargaining power of tenants (thus resulting in lower rentals). The costs of introducing legislative reforms would likely outweigh any benefits accruing from those reforms.

Conversely, reforms currently being implemented as a result of the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011* (the Amendment Act) have capacity to deliver benefits to tenants, without the additional costs of implementing lease registration requirements. The Department recommends that it is more appropriate at this stage to allow these proposed reforms time to take effect before introducing further legislative amendment.

In addition, the newly established Small Business Commissioner will provide assistance, advice and mediation services to small businesses in relation to commercial tenancy issues.

Other measures that are being pursued with a view to assisting tenants in their negotiations with landlords, include the provision of advice and education to tenants and amendment of the disclosure statement and tenant guide (provided to tenants prior to entry into a lease) to improve disclosure of lease information to tenants.

¹ 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

² Review of the Commercial Tenancy (Retail Shops) Agreement Act 2003 (Review Committee Report)

The Department recommends that, at this stage, the Government implement and monitor recent amendments with no additional legislative change.

The Small Business Commissioner's role in providing advice and mediation in relation to commercial tenancy matters will assist in monitoring this issue.

1 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 tenants³. 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 to other participants in the retail tenancy market.

It has been suggested that this lack of access to rental information can hamper efficient decision making by tenants.⁴ 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 are often frustrated by the lack of access to meaningful data and are unable to present to the State Administrative Tribunal⁵ (SAT) valuation reports which will stand up to scrutiny⁶.

This issue was raised during discussions and Parliamentary debates concerning changes to retail trading hours and the potential impact on small business. In the context of those discussions, the Government committed to examining various options for addressing the issue of information asymmetry and to considering whether implementation of any of those options would be feasible and justifiable.

It should be noted that little market evidence is available as to the extent of this issue and its impact on retail tenants. Lack of access to market information should possibly be viewed as only one of the contributing factors to the overall issue of imbalance in bargaining power that exists between landlords and smaller business tenants.

More broadly, there appears to be little evidence of any failure in the retail tenancy market. In its 2008 inquiry on *The Market for Retail Tenancy Leases in Australia*, the Productivity Commission did not find strong evidence that the difference in the size of market participants in the retail tenancy sector distorts the efficient operation of the market and commented that “overall, the market is working reasonably well”.⁷ The Productivity Commission warned that:

*Hard bargaining; an unwillingness to seek professional negotiating, financial or legal advice; varying business fortunes; and disappointments in performance within shopping centre or other retail formats, should not be confused with economic failure and do not make the case for government intervention in the retail tenancy market.*⁸

1.1 Legislative framework

1.1.1 Commercial Tenancy Act

The *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (the Commercial Tenancy Act) regulates commercial tenancy agreements in relation to particular types of premises, namely retail shops.

³ Review Committee Report and Productivity Commission Report

⁴ Productivity Commission Report – page 174

⁵ Previously the Commercial Tribunal

⁶ Review Committee Report – page 96

⁷ Productivity Commission Report – Overview xxv

⁸ Productivity Commission Report – page 248

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 not in a retail shopping centre 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 have a floor area in excess of 1,000 square metres or the tenant is a public company⁹.

At present, the Commercial Tenancy Act does not include provisions specifically providing for registration of lease information.

However, the Commercial Tenancy Act does include a number of provisions aimed at improving transparency and fairness in the retail tenancy market, these include:

- a requirement for landlords to disclose certain leasing information to tenants prior to entry into a lease;
- a minimum five year lease term for most leases;
- a prohibition on landlords requiring retail shops to open during certain hours;
- provisions regulating the allocation of operating expenses or outgoings;
- provisions regulating rent reviews;
- prohibitions on unconscionable conduct; and
- provisions concerning dispute resolution, including access to mediation by the Small Business Commissioner and determination of issues by the State Administrative Tribunal.

The provisions concerning disclosure of information require landlords to provide a tenant guide and disclosure statement to the tenant, prior to entering into a lease with a tenant. The tenant guide sets out the key provisions of the Act (in plain language). The disclosure statement summarises the key provisions of the lease (term, rent, operating expenses, permitted use etc) and provides specified information about the premises, the shopping centre (if applicable) and services provided.

Both the tenant guide and disclosure statement are prescribed by regulation and are currently being reviewed and updated as part of the implementation of the Amendment Act.

⁹ Amendments to the Commercial Tenancy Act to be made by the Amendment Act will allow some premises over 1000 square metres to be prescribed as falling within the definition of retail shop lease and will narrow the exclusion from the definition from public companies to listed public companies.

1.1.2 Amendment Act

In 2003, a Review Committee undertook a review of the Commercial Tenancy Act and made a number of recommendations for reform. The Amendment Act seeks to implement a number of these recommendations by amending the Commercial Tenancy Act to address some deficiencies in the legislation and to strengthen the protections for small business. It is anticipated that the amendments included in the Amendment Act will come into effect in mid-2012.

The issue of increasing access to lease information is not addressed in the Amendment Act except to a limited extent, as outlined below.

In order to implement one of the recommendations of the Review Committee¹⁰, the Amendment Act 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 regulations¹¹.

Under the 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 information¹².

A provision is also included in the Amendment Act to ensure that any information provided to the valuer remains confidential and can only be disclosed in certain limited circumstances¹³.

The proposed amendments to the Commercial Tenancy Act will ensure that valuers have improved access to lease information. Prior to introduction of the amendments, there was no legislative requirement for landlords to provide lease information to valuers. However, it is important to note that this information will only be provided to valuers appointed to undertake a market review of the rental for particular retail shop premises during the term of the lease¹⁴.

Some 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 at the time of a market review of rental.

In addition to the amendments outlined above, the Amendment Act includes a number of changes aimed at improving the bargaining position of tenants, including provisions which will:

- allow tenants to make more informed leasing decisions by requiring landlords to include additional information in the disclosure statements provided to tenants;

¹⁰ Review Committee Report - Recommendation 30 – page 96

¹¹ See Amendment Act – section 8 – proposed section 11(3B)

¹² See Amendment Act – section 8 – proposed section 11(3C)

¹³ See Amendment Act – section 9 – proposed section 11A

¹⁴ See section 11 of the Commercial Tenancy Act.

- enhance security of tenure by protecting the rights of tenants with respect to options to renew and shopping centre redevelopments or relocations;
- improve the negotiating power of tenants by prohibiting landlords from passing on certain legal fees to tenants; and
- prohibit misleading and deceptive conduct and give the State Administrative Tribunal the jurisdiction to hear claims in relation to misleading and deceptive conduct.

Amendments to the Regulations that are currently being drafted to support the Amendment Act will include significant revision of the disclosure statement and tenant guide – these changes are aimed at improving the form and quality of information provided to tenants.

The proposed reforms will assist in redressing the information imbalance that can occur between landlords and tenants and ensure the Commercial Tenancy Act provides a more transparent framework in which the parties can pursue their commercial interests.

1.1.3 *Transfer of Land Act*

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, with landlords assuming responsibility for actually registering the lease documents.

A by-product of lease registration on the title is improved access to lease information, as searches may be conducted of any documents registered on the title.

Only a limited number of leases are currently registered in Western Australia compared to other jurisdictions, resulting in limited access to lease information from the titles register. Registration is much more common in jurisdictions such as New South Wales and Queensland, 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 registered¹⁵. In addition, lessees in Western Australia can protect their interests by lodging a caveat instead of registering the lease on the title.

1.2 Other jurisdictions

As mentioned above, all other States also allow for registration of a lease on the land title. Registration on the title is voluntary in all jurisdictions¹⁶.

¹⁵ See *Transfer of Land Act 1893* (section 68) and *Commercial Tenancy (Retail Shops) Agreements Act 1985* (section 13).

¹⁶ 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.

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 on the title¹⁷.

The Victorian *Retail Leases Act 2003* also provides that landlords must notify the Victorian Small Business Commissioner (the VSB Commissioner) of the following details in relation to a lease:

- address of the premises;
- name and address (including email address) of landlord and tenant;
- date on which the lease was signed by all parties or renewed;
- lease expiry date; and
- the date/period within which an option may be exercised¹⁸.

Details of rent payable are not required to be provided to the VSB Commissioner. The VSB Commissioner must create and maintain a register of this information, but may only use the information for the purposes of performance by the Commissioner of his or her functions under the *Retail Leases Act 2003*¹⁹. The Victorian register is therefore not a publicly accessible register of lease information.

To date, no State or Territory in Australia has established a publicly accessible database for the compulsory registration of lease information.

1.3 What information and advice is currently available to tenants?

At present in Western Australia tenants are provided with information about the lease for their retail shop premises prior to entry into the lease in the form of a disclosure statement.

It appears that information about market rentals is less readily available. Limited information is accessible through undertaking searches of the land title.

Tenants are also able to utilise the services of lease information consultants for a fee. Lease information consultants collate lease data and develop various reports which they then sell for a fee. These providers often gather information from the land titles register. Charges vary considerably depending on the degree of detail sought. Evidence indicates that the cost of these reports can range from approximately \$700 to \$3,500 depending on the level of complexity.

It is also understood that these consultants are more commonly used by tenants in the Eastern States rather than in Western Australia. This may be due to the fact that the consultants have access to greater lease information as it is more common practice in the Eastern States for tenants to register their lease on the land title. Registration is more common in the Eastern States than in Western Australia as the *Transfer of Land Act 1893* in Western Australia provides protection for leases of up to five years (this protection only applies to leases of up to three years in the Eastern States). It has also been suggested that there may be a lack of awareness of the services of lease information consultants in Western Australia and this may change over coming years.

Other types of retail leasing consultants also offer services to tenants - for example, some offer negotiation services or assist tenants in finding an appropriate location.

¹⁷ NSW – 3 years; Vic – 3 years; Qld – 3 yrs; SA – 1 year; Tas – 3 years

¹⁸ Section 25 *Retail Lease Act 2003* (Vic) and Regulation 9 *Retail Leases Regulations 2003* (Vic)

¹⁹ Section 84 *Retail Lease Act 2003* (Vic)

Tenants are also able to engage the services of a land valuer prior to entering into a lease. A land valuer may assist a tenant to determine whether the rent being offered represents fair market value. It is understood that at present, tenants do not commonly use land valuers for this purpose given the potentially prohibitive costs of engaging a valuer.

In addition, some tenants may undertake their own market research by comparing the rental terms of premises advertised for lease.

It is noted that legislation has recently been passed by the Parliament to create a Small Business Commissioner for Western Australia²⁰. The Small Business Commissioner will provide advisory and dispute resolution services to small businesses and will have a statutory role in relation to dispute resolution under the Commercial Tenancy Act. It is anticipated that the creation of the Small Business Commissioner will assist small business tenants in dealing with their landlords.

The Small Business Development Corporation (SBDC) also provides advice to small businesses about retail tenancy matters. The SBDC has a Small Business Services Team that provides advice on commercial tenancy matters; publishes a variety of information concerning commercial tenancy issues; and runs regular workshops for small business people.

1.4 Previous consultation on the issue

1.4.1 Review of the Commercial Tenancy Act – 2003

As mentioned above, in 2003, a Review Committee undertook a review of the Commercial Tenancy Act and made a number of recommendations for reform.

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 information²¹. The Review Committee did not identify what this lease information should be.

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 tenants²².

1.4.2 Productivity Commission Inquiry – 2008

In its 2008 Inquiry on *The Market for Retail Tenancy Leases in Australia* 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.

²⁰ *Small Business and Retail Shop Legislation Amendment Act 2011*

²¹ Review Committee Report - Recommendation 31 – page 96

²² Review Committee Report - Page 98

The Productivity Commission concluded that compulsory registration on the title could not be justified and 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 site²³.

Key lease terms would be included in the summary, including rent, outgoings and other key statistics²⁴. The Productivity Commission was of the view that lodgement of the summary should be voluntary rather than mandatory.

The Commonwealth Government published its formal response to the Productivity Commission's report in August 2008. In its response the Commonwealth states that it agrees in principle with the Productivity Commission's recommendation and provides as follows:

The Commonwealth recognises that access to information relating to market conditions improves understanding by market participants, thereby improving the ability of tenants to make informed decisions about their lease. This, in turn, may reduce power imbalances between landlords and tenants, and improve the efficient operation of the market.

However, the Commonwealth has concerns that the information contained in the standard one page summary may not always be current and may not contain information that fully reflects the terms and value of a lease. The Commonwealth also has concerns that reliance on this information, particularly by new and less-experienced tenants may potentially increase disputes and business failures. Reliance on this information may also reduce due diligence and reduce the propensity for appropriate legal and financial advice to be sought.

If this recommendation is to be implemented, the Commonwealth would want to be assured that it offers net benefits to retail tenancy participants. If that assurance could not be provided then the Commonwealth would not support proceeding with the measure.²⁵

1.4.3 Register maintained by shopping centre landlords - 2010

In September 2010, the Western Australian 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.

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.

²³ Productivity Commission Report - Page xxx

²⁴ Productivity Commission Report – Page 181

²⁵ Commonwealth Government response to the Productivity Commission Inquiry: The Market for Retail Tenancy Leases in Australia – August 2008, page 5

The Department received 31 submissions from various stakeholders.

An analysis of the submissions revealed that, while a number of the respondents supported lease registration in some form, there was limited support for the model proposed in the 2010 Position Paper (shopping centre register). Only four respondents (13%) indicated support (or qualified support) for the shopping centre register model. Therefore, the Government does not intend to progress with this particular model.

A number of stakeholders indicated some support for the alternative options outlined in the 2010 Position Paper and for other alternative 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 registration requirements into the Commercial Tenancy Act.

The submissions indicated support for the various models as follows:

Model	No.
Support for shopping centre register	2
Qualified support for shopping centre register (access to be limited)	2
Support for public register	9
Support for registration on title	10
Do not support any register	7
No clear position	1

2 OBJECTIVES

The policy goal 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.

An option will only be viable if the increased access to information can be achieved at a reasonable cost, so that the costs of gaining that access do not outweigh the benefits.

The overarching objective in increasing transparency of lease information is to address the information imbalance which exists between landlords and tenants. The desired outcome of reform is to improve the bargaining position of tenants so as to facilitate fairer lease agreements and a more efficient and fair retail tenancy market.

Improved availability of information for land valuers will also assist them in performing their functions in relation to retail leases.

In order to achieve this outcome any option for reform will need to:

- provide information that is relevant and up to date;
- provide information about all retail shops, rather than limited sectors;
- provide information in an understandable format;
- be easily accessible; and
- be cost effective.

Other factors that require consideration include:

- the extent to which market participants would access and use the lease information if it were available;
- issues relating to privacy or confidentiality;
- the administrative burden imposed on landlords and tenants in complying with legislative requirements;
- consistency with other jurisdictions; and
- the need to minimise the potential for disputation between the parties.

3 OPTIONS TO ADDRESS THE ISSUE

In previous consultations, stakeholders have identified three possible options for legislative change to address the issue of information asymmetry in the retail tenancy market. Each of these options is outlined below. Also outlined is the option of maintaining the status-quo and not implementing any legislative change, but to address the issue through other mechanisms.

3.1 Option A - Maintain status quo – base case

This is the “do nothing” option. Under this option the changes included in the Amendment Act (and encompassing the amendments to the Regulations-see section 1.1.2 above) would be implemented, but no further legislative amendments would be made.

Other non-legislative mechanisms aimed at improving information transparency and accessibility, such as provision of education and advice to tenants, could be implemented under Option A.

The creation of the Small Business Commissioner is likely to assist small business tenants by providing advisory and mediation services in relation to commercial tenancy issues.

The SBDC will also continue to provide advice to small businesses about a variety of matters, including retail tenancy matters.

Most respondents who support the status quo option suggest that any further legislative reform should be delayed until the impact of the Amendment Act and the impact of the Small Business Commissioner on the industry can be properly assessed.

There are concerns that the costs of implementing the other options to improve access to lease information may outweigh the benefits. Option A serves as the base case for analysis of the alternative options. Options B, C or D would need to offer a net benefit in order to justify government intervention.

3.2 Option B - Increase valuer access to information

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

Landlords would be required to 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.

As indicated in section 1.1.2 above, the Amendment Act contains an 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 at review 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.

During consultation on the 2010 Position Paper, some market participants indicated support for broadening the scope of this 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 amendment in this way, would mean that any confidentiality provisions included in the Amendment Act, and the proposed 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 prospective tenants in determining whether to enter into or renew a lease and improve their bargaining power when negotiating the terms of the lease.

3.3 Option C – Public lease register

Option C would see creation of a publicly accessible, electronically based, centralised lease register or database. Registration requirements would apply to all retail shops and not just those located in shopping centres.

Under this option, the Commercial Tenancy Act would 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. Market participants would be able to search the database using various filters (such as location, size of premises or business type) and obtain reports setting out a summary of lease details for leases falling within various categories. Landgate provides a similar service which allows a person to purchase various reports in relation to the sale of property in Western Australia.

Stakeholders have suggested that:

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

- 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.

3.4 Option D – Mandatory registration on land title

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

Under this option, following execution of a retail shop lease, the landlord would be required to register the lease on the land title. Any person could then search the title and obtain a copy of any leases registered thereon from Landgate.

At present, the TLA provides for the registration of lease (on a voluntary basis) with a term of three years or more (excluding options to renew). If all leases are to be registered on the title, amendment of the TLA would be required.

4 IMPACT ANALYSIS

The above options have the potential to impact on industry participants as well as the retail tenancy market as a whole. This section outlines the potential benefits, risks and costs of each of the options. The section also assesses the potential for Options B, C and D to meet the objectives for reform set out in Part 2. Option A does not propose any legislative reform. Therefore, Option A can not be assessed against the objectives for reform.

Implementation of any of Options B, C or D 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 significant negative impact on the ability of retail businesses to compete in the market or the range of businesses which have access to the market. However, some stakeholders have expressed concern that access to confidential information could have an impact on the competitive advantage negotiated by a specific tenant.

4.1 Option A: maintain status quo

The following potential benefits have been identified in relation to Option A:

- 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 below);
- the Amendment Act will introduce a number of benefits for small business tenants. In particular, the Amendment Act will seek to redress the imbalance in bargaining power between landlords and tenants by:
 - preventing landlords from passing on legal fees to tenants, thus freeing up funds for tenants to obtain their own independent advice;
 - improving the disclosures and transparency of lease information provided to tenants, through the amendments to the disclosure statement;
 - prohibiting misleading and deceptive conduct; and
 - increasing a valuers access to lease information for the purpose of a market rent review, resulting in fairer rent reviews,
- there will be improved access to advice and dispute resolution services for small business through the new Small Business Commissioner; and
- Option A allows time for the impact of the Amendment Act and the Small Business Commissioner to take effect and be assessed before undertaking further legislative reform. This approach is consistent with the Productivity Commission's recommendation not to extend current laws unless there is a clear net benefit to the community²⁶.

The disadvantage of this option is that the current issues associated with the lack of accessibility of lease information are potentially unrelieved. However, given the uncertainty about the value of additional information to small businesses, it is difficult to assess whether this would be a significant problem.

²⁶ Productivity Commission Report

Some concerns about lack of information provided to tenants could also be overcome to some degree if the parties seek appropriate expert advice prior to entry into a lease.

There should be no additional cost implications of option A. It is arguable that parties are currently incurring costs where the issue of information asymmetry results in disputation between the parties to a lease agreement and government agencies (such as the SATI) incur costs in resolving those disputes. However these costs are indirect and difficult to measure. Further, it is intended that the introduction of both the Amendment Act and the Small Business Commissioner will result in a decrease in disputation costs by increasing the clarity of the legislation, disclosure to small business tenants, and access to advisory and mediation services.

4.2 Option B - 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.

4.2.1 Potential advantages and disadvantages

The following potential benefits have been identified in relation to Option B:

- access to information would be provided to valuers at any time, not just on a market review of rental, thus creating greater access to lease information for tenants than the current proposed amendment in the Amendment Act – this would be of particular use to prospective tenants during negotiations prior to commencement and at renewal of a lease;
- 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. In addition, confidentiality provisions included in the Amendment Act would likely apply²⁷;
- 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 currently included in the Amendment Act – 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 to Option B, including:

- 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;
- 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;

²⁷

See new section 11A.

- the information available will 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; and
- landlords will incur some costs in providing the information to valuers.

It should also be noted that Option B may have some negative impact on the ability of lease advisors to compete in the market with valuers as, under this option, lease information will only be provided to land valuers appointed by tenants. This restriction may be regarded as a barrier to entry to the leasing advisory market.

However, it is noted that because Option B does not impose a legislative requirement on tenants to engage a valuer (i.e. a tenant can choose whether or not to appoint a valuer), the potential impact on lease advisors may not be that significant, particularly if lease advisors can continue to offer tenants a broader range of services for a lower fee. One lease advisory company in its submission on Option B suggested that small business people are extremely time poor and do not have the time or resources to visit a valuer and engage them to provide an analysis. Nevertheless, Option B could potentially provide land valuers with some competitive advantage over other advisors in the retail leasing sector.

Under Option B access to lease information is also limited to valuers appointed by tenants; there is no access for representatives of landlords. Some stakeholders have suggested that landlords and their representatives already have access to this information and therefore do not require the services of a valuer.

4.2.2 Potential costs

The following table summarises the potential costs involved in implementing Option B.

Option B – Costs	
Landlords	<p>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 may be minimal as landlords are likely to already maintain records of the relevant lease details. Landlords costs will be administrative in nature and would increase as landlords would be required to provide information more frequently than currently anticipated under the amendments contained in the Amendment Act.</p> <p>It is difficult to quantify the potential costs to each landlord as they will vary depending on factors such as:</p> <ul style="list-style-type: none"> ▪ 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. <p>The following estimates have been developed using the Office of Best Practice Regulation Business Cost Calculator:</p> <p>Start up cost per lease - \$25; Ongoing cost per year - \$13</p> <p>Total for all leases (12,250 shopping centre leases)</p> <p>Start up - \$306,250; Ongoing - \$159,250</p>

Option B – Costs	
Tenants	<p>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.</p> <p>The <i>Land Valuers Licensing (Remuneration) Notice 2010</i> 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.</p>
Government	<p>This option imposes minimal costs on Government.</p> <p>Some costs may be incurred by the SAT if tenants seek orders for compliance with a request for information.</p> <p>It is estimated that the establishment costs and first year costs to Government to operate and maintain the system would be approximately \$465,000.</p> <p>Ongoing annual costs are estimated to be approximately \$86,000.</p>

4.2.3 Assessment against the objectives

The following table outlines how well Option B addresses the objectives.

Assessment of Option B against the objectives	
Improves transparency of lease information and bargaining power of tenants	<p>Option B will improve access to a limited range of lease information, to a limited class of persons (land valuers appointed by tenants). Those tenants who appoint land valuers may be in a position to make more informed leasing decisions.</p> <p>It is questionable as to whether access to lease information will in fact improve the bargaining power of tenants with their landlords, resulting in lower rentals. Some respondents suggest it is more important in improving bargaining power, that tenants are fully aware of the implications of their own lease, rather than have access to the lease details of other tenants.</p>
Provides information that is relevant and up to date	<p>A valuer engaged by a tenant will obtain and assess lease information that is most relevant and useful to the tenant at that particular point in time. Information will be up to date as at the time of the valuer's request. Therefore, out of all of the options, Option B is most likely to achieve the policy objective of providing tenants with information that is relevant and up to date.</p>
Provides information about all retail shops	<p>Option B 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.</p> <p>Whilst some respondents have suggested that the issues arising from a lack of accessibility to lease information are most problematic in shopping centres, it is nevertheless the case, that this option is limited only to retail shops in shopping centres.</p> <p>Option B may not adequately address the policy objective of providing information about all retail shops.</p>
Information presented in usable format	<p>Under this proposal, it is likely that a valuer will extract and present relevant lease information to the tenant in a way that is most easily understood by the tenant.</p> <p>It is likely that Option B would be effective in achieving this particular policy objective.</p>
Information is easily accessible	<p>Some respondents have indicated that tenants have experienced difficulties in obtaining a valuer or, at least, an independent valuer. However, the Australian Property Institute has indicated that they are not aware of any shortage of independent valuers for tenants in</p>

Assessment of Option B against the objectives	
	<p>Western Australia.</p> <p>Nevertheless, it is anticipated that amending the legislation to require landlords to provide lease information to valuers, should result in more valuers moving into this space in the industry. It is therefore hoped that accessibility of valuers should not be an issue for tenants.</p> <p>Another related issue is that some tenants may not be aware of the role valuers can play in obtaining lease information for tenants (particularly prior to commencement of a lease). In a survey conducted by the Small Business Development Corporation²⁸, of the 250 small business tenants surveyed only 2% utilised a valuer before signing a lease. Therefore, further education may be required if Option B was implemented.</p> <p>Also, due to the potential costs of hiring a valuer, some tenants may choose to use their limited resources to engage another service (such as a lawyer or leasing consultant) in preference to a valuer when negotiating their lease. A number of respondents have indicated that tenants are often represented by leasing professionals who are not licensed valuers. Under Option B these tenant representatives would not have access to the relevant lease information.</p> <p>The effectiveness of Option B could also be affected by timing issues. A certain degree of time may be required in order to appoint a valuer, have the valuer request and receive the relevant information from the landlord and then analyse the information, before presenting a report to the tenant (or prospective tenant).</p> <p>Whilst, there are no significant barriers to tenants accessing a valuer, there may be some related issues such as cost, timing and tenant awareness which may mean that Option B is not as effective as some of the other proposals in achieving the policy objective of ensuring that the lease information is easily accessible.</p>
Addresses confidentiality concerns	<p>Confidentiality concerns are addressed to some degree by Option B as the lease information is only provided to valuers, who are subject to certain confidentiality requirements²⁹ (rather than being publicly available).</p> <p>It should be noted that some tenants may still have concerns about lease information being disclosed to the representative of another tenant (potentially a competitor), even in the limited manner proposed by Option B. The SBDC Survey results reveal that 51% did not want their rental disclosed to a party other than their landlord.</p> <p>Option B is effective to some degree in meeting this policy objective.</p>

²⁸ The SBDC Survey – see Part 5.3

²⁹ Licensed Valuers are required to comply with the *Licensed Valuers Code of Conduct* prescribed under the *Land Valuers Act 1978*. Confidentiality provisions could also be included in the CT Act in relation to information provided to a valuer – see discussion about confidentiality provisions in the Amendment Act at Part 1.1.2.

Assessment of Option B against the objectives	
Cost effective	<p>One of the main criticisms of Option B from respondents relates to the potential costs of engaging 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.</p> <p>The <i>Land Valuers Licensing (Remuneration) Notice 2010</i> caps a valuers remuneration at \$385 per hour with more experienced valuers charging up to \$519.75 per hour with client approval. The SBDC Survey reveals that 47% of small businesses surveyed indicated that they would be willing to spend up to \$300 to a professional to access retail lease information, however only 13% indicated that they would spend over \$500. Therefore it is likely that only a minority would be willing to pay an amount that properly reflects the actual cost of engaging a valuer.</p> <p>Therefore, whilst this option may provide up to date and relevant information, it is also potentially the most expensive option for tenants. Out of all of the proposals, Option B is likely to be the least cost effective for tenants.</p> <p>Costs to landlords would vary, depending on the number of requests for information received. Some costs will be incurred by landlords in maintaining records in an accessible format. However, given that landlords are likely to maintain appropriate records in any event; these costs are likely to be minimal.</p> <p>However, from a cost to Government perspective, this option is the most cost effective.</p> <p>Option B is also an elective option – costs would only be imposed where tenants choose to take advantage of the ability to appoint a valuer to access and assess information – this option does not impose costs across the industry as a whole.</p>
Provides for greater access to information to valuers to enable them to perform their functions in relation to retail leases	<p>Option B provides access to lease information to land valuers engaged by tenants. This access is broader than that provided for by the proposed amendments in the Amendment Act.</p> <p>However it should be noted that access will only be provided to information about retail shops in the specific shopping centre or group of shops in which the valuer's client is a tenant or prospective tenant. In addition, the information will not be provided in context as valuers will not be given access to actual lease documents.</p> <p>Option one is effective to some degree in meeting this criteria.</p>

4.3 Option C: Public lease register

Creation of a publicly accessible, electronically based, centralised lease register.

4.3.1 *Potential advantages and disadvantages*

The following potential benefits have been identified in relation to Option C:

- 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;
- information would be easily accessible to all participants in the retail tenancy market;
- confidentiality could be maintained to some degree by keeping the details of the landlord and tenant confidential or aggregating the database;
- 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); and

- it may be possible to utilise existing Government information management systems in establishing the register.

There are also a number of potential disadvantages to Option C, including:

- concerns about confidentiality - commercially sensitive information will be broadly available on a public register;
- the costs in establishing and maintaining an appropriate database could be significant (a number of respondents have queried whether such a database could operate effectively on a cost recovery basis);
- costs involved in conducting searches, particularly multiple searches, of the register could be significant;
- 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). Creation of additional legislative requirements that are inconsistent with other jurisdictions could impose an additional administrative burden on landlords who operate nationally, as they may be required to establish different systems or procedures for Western Australia;
- difficulties in ensuring that information can be used appropriately and that 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, nature of building, 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;
- potential liability to Government if there are errors in the database; 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.

4.3.2 Potential costs

The following table summarises the potential costs involved in implementing Option C.

Option C - Costs	
Landlords	<p>Some costs will be imposed on landlords in relation to:</p> <ul style="list-style-type: none"> 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. <p>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.</p> <p>The following estimates have been developed using the Office of Best Practice Regulation Business Cost Calculator:</p> <p>Start up cost per lease - \$100; Ongoing cost per year - \$46.25</p> <p>Total for all leases (35,000 leases)</p> <p>Start up - \$3,500,000; Ongoing - \$1,618,750</p> <p>Note – these estimates are based on the assumption that all leases will need to be registered as at the commencement date.</p>
Tenants	<p>Costs will be incurred by tenants and other businesses in accessing information from the register.</p> <p>It is difficult to estimate the cost to undertake searches of the database – estimates of costs based on a full cost recovery model would likely set search fees in the range of \$330 to \$1,650. These fees are prohibitive, therefore full cost recovery would not be recommended.</p> <p>Costs could possibly be set somewhere between \$30 and \$200 per report depending on the cost recovery model used, the level utilisation of the system by the industry and the complexity of reports generated.</p>
Government	<p>Implementation of this proposal is likely to be the most costly for Government. Costs will be incurred in:</p> <ul style="list-style-type: none"> establishing the database (including the development of appropriate information technology systems); maintaining the database; compliance and enforcement; and advice and education. <p>Several respondents have indicated that Landgate would be the most suitable agency to host a new public lease register. However, Landgate has suggested that the agency responsible for the commercial tenancy legislation (the Department of Commerce) should maintain the database.</p> <p>As the Department of Commerce does not currently have a comparable database, there would be additional costs to Government in establishing a new public lease database within the Department of Commerce. Government would examine the possibility of utilising current data management systems within Government in order to reduce costs.</p> <p>It is estimated that the establishment costs and first year costs to Government to operate and maintain the system would be approximately \$2.76 million.</p> <p>Ongoing annual costs are estimated to be approximately \$1.27 million.</p> <p>Some of the costs to Government would be recovered from search fees paid to access the information on the database.</p>

4.3.3 Assessment against the objectives

The following table outlines how well Option C addresses the objectives.

Assessment of Option C against the objectives	
Improves transparency of lease information and bargaining power of tenants	<p>Option C provides broad public access to lease information, thus permitting tenants to make more informed leasing decisions if they access that information.</p> <p>It is questionable as to whether access to lease information will in fact improve the bargaining power of tenants with their landlords, resulting in lower rentals. Some respondents suggest it is more important in improving bargaining power, that tenants are fully aware of the implications of their own lease, rather than have access to the lease details of other tenants.</p>
Provides information that is relevant and up to date	<p>Option C will provide information on all retail shops. Information will be broadly available; however, users will need to filter the information in order to access information that is relevant to their needs.</p> <p>A number of respondents to the Consultation-RIS suggested that some of the disadvantages of this option related to the potential difficulties in:</p> <ul style="list-style-type: none"> keeping the register up to date, given the number of variations, renewals and assignments of leases occurring in the market; and 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 variables also need to be taken into account (for example, incentives, location, tenant mix etc) to ensure that the comparison is meaningful and not misleading. <p>It is possible that the legislation could be amended to ensure landlords continually update lease information by imposing a penalty for non-compliance. However, as the Commercial Tenancy Act does not currently contain penalty provisions, this would represent a significant ideological and practical shift in the operation of the current legislation. It would also impose new compliance costs.</p> <p>Option C achieves this policy objective to some degree – but there are some issues that will need to be resolved for the option to be effective.</p>
Provides information about all retail shops	<p>One of the principal benefits of a public lease register is that 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.</p> <p>Option C achieves this particular policy objective.</p>
Information presented in usable format	<p>It is likely that tenants will be able to undertake searches, based on certain variables, and obtain summary reports of relevant information. Parties will not need to search extensive lease documents in order to obtain information. However, it should be noted that the information will not be provided in context or reflect all of the factors which may contribute to certain lease terms (eg tenancy mix, economic climate, lease incentives or side-deals), which could potentially mislead some market participants.</p> <p>Option C is effective to some degree at achieving this objective, but is questionable whether Option C fully achieves this objective.</p>

Assessment of Option C against the objectives	
Information is easily accessible	<p>A public lease register should be easily accessible to all users.</p> <p>It is anticipated that a nominal search fee would not be a barrier to access. However, if costs of searches are determined on a costs recovery basis, they may be higher and possibly deter some tenants from accessing lease information in this manner.</p> <p>Access to information would be provided in a timely manner.</p> <p>Option C should achieve this particular policy objective.</p>
Addresses confidentiality concerns	<p>Option C provides broad access to commercially sensitive information.</p> <p>Confidentiality could be protected to some degree by ensuring that the details of the landlord and tenant are not published, however, in order to be meaningful, information such as location of a retail shop would likely need to be included as publicly available information.</p> <p>It has also been suggested that information could be aggregated to protect confidentiality or that access to information could be protected by different layers of security clearance. However, aggregation of data could negate the utility of the information.</p> <p>Some other respondents, like the SBDC have also expressed concerns about the confidentiality of this option. The SBDC Survey reveals there is significant sensitivity around the disclosure of lease information. Just over half (51%) of all respondents did not want their rent payable and specifically negotiated incentives (50%) disclosed to a party other than their landlord. Similarly, just under half did not want details that could identify their business (43%), their contribution to marketing promotional funds (42%) or option periods (41%) being disclosed to other parties.</p> <p>It is questionable whether Option C achieves this objective.</p>
Cost effective	<p>The cost of undertaking searches on a public lease register is likely to be lower than the cost associated with appointing a valuer or undertaking extensive searches of the land title. Therefore, with the exception of Option A, this option is likely to be the most effective in achieving the policy objective of being cost effective for landlords and tenants.</p> <p>However, it is noted, that implementation of this proposal is likely to be the most costly for Government.</p> <p>Option C is not an elective option, therefore costs will be imposed across the industry, regardless of whether industry participants actually use information contained in the database.</p>
Provides for greater access to information to valuers to enable them to perform their functions in relation to retail leases	<p>Option C provides broad access to information for valuers across the retail tenancy sector. However, information is not provided in context or with access to appropriate source documentation.</p> <p>Option C is therefore partially effective at meeting this objective, although costs would be heightened in paying a valuer for searches.</p>

4.3.4 Productivity Commission views

The Productivity Commission recommended that market participants should lodge a standard one page lease summary at a publicly accessible site.³⁰ 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 information³¹.

Option C, if implemented would be broadly consistent with the Productivity Commission's recommendation. However, it should be noted, that the Productivity Commission recommended that lodgement be voluntary, rather than mandatory.

4.4 Option D: Mandatory registration on the title

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

4.4.1 Potential advantages and disadvantages

The following potential benefits have been identified in relation to Option D:

- provides for increased availability of lease information in relation to all retail shops;
- utilises the land title system already in place at Landgate to facilitate registration; and
- will allow parties to assess lease information in context, as the whole lease agreement will be registered and accessible.

There are also a number of potential disadvantages to Option D, including:

- 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;

³⁰ Productivity Commission Report – page 253

³¹ Productivity Commission Report – page 253

- the cost of conducting searches (currently \$24 each lease) could be prohibitive, particularly if a tenant wishes to assess a broad range of lease information – 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;
- additional costs would be incurred by Landgate in processing lease registrations and search requests; and
- the current low levels of lease registration in WA indicate that the majority of tenants do not consider registration necessary to protect their interests.

4.4.2 Potential costs

The following table summarises the potential costs involved in implementing Option D.

Option D – Costs	
Landlords	<p>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.</p> <p>Additional legal and administrative costs will be incurred in ensuring that the lease is in a registrable format (in compliance with Landgate requirements) and in physically lodging the lease for registration.</p> <p>Approx 1 hour legal work - \$200 to \$400.</p> <p>Additional costs will be incurred if surveys are required or if mortgagee consent must be obtained prior to registration.</p> <p>Similar fees would be incurred in order to register a surrender of lease with Landgate at the end of the lease term.</p> <p>The following estimates have been developed using the Office of Best Practice Regulation Business Cost Calculator:</p> <p>Start up cost per lease - \$300; Ongoing cost per year - \$121.25</p> <p>Total for all leases (35,000 leases)</p> <p>Start up - \$10,500,000; Ongoing - \$4,243,750</p> <p>Note – these estimates are based on the assumption that all leases will need to be registered as at the commencement date.</p>

Tenants	<p>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).</p> <p>This would be payable on registration of the lease and again upon surrender of the lease at the expiry of the lease term.</p> <p>The following estimates have been developed using the Office of Best Practice Regulation Business Cost Calculator:</p> <p>Start up cost per lease - \$160; Ongoing cost per year - \$64</p> <p>Total for all leases (35,000 leases)</p> <p>Start up - \$5,600,000; Ongoing - \$2,240,000</p> <p>Costs will be incurred by tenants and other businesses in undertaking land titles searches of relevant documents in order to access the information.</p> <p>Search fees are currently \$24 per document. It is anticipated that a tenant would need to obtain copies of several documents for comparative purposes.</p> <p>Fees may also be incurred in appointing a suitably qualified professional to analyse the lease documents.</p> <p>Information may also be obtained from leasing information providers who collate information (from searches of the title) and provide it in a report or summary form – a report for a shopping centre might cost approximately \$750-800. Other more complex reports might cost approximately \$3,500.</p>
Government	<p>There will also be additional costs to Landgate arising from a higher volume of registrations and searches.</p> <p>Compliance costs will also be incurred by Government.</p> <p>It is estimated that the establishment costs and first year costs to Government to operate and maintain the system would be approximately \$1.75 million.</p> <p>Ongoing annual costs are estimated to be approximately \$1.3 million.</p> <p>Some of the costs to Government would be recovered from search fees and registration fees.</p>

4.4.3 Assessment against the objectives

The following table outlines how well Option D addresses the objectives.

Assessment of Option D against the objectives	
Improves transparency of lease information and bargaining power of tenants	<p>Option D provides broad public access to lease information, thus permitting tenants to make more informed leasing decisions if they access that information.</p> <p>It is questionable as to whether access to lease information will in fact improve the bargaining power of tenants with their landlords, resulting in lower rentals. Some respondents suggest it is more important in improving bargaining power, that tenants are fully aware of the implications of their own lease, rather than have access to the lease details of other tenants.</p>

Assessment of Option D against the objectives	
Provides information that is relevant and up to date	<p>Some respondents have raised concerns about the currency and relevance of lease information available under Option D.</p> <p>Some respondents have suggested that currency issues could be addressed by imposing a requirement on landlords to update the register if a lease is varied, transferred or surrendered. However, this would add to the costs and complexity of the proposal.</p> <p>Concerns have also been raised about the relevance of the information under this option. Respondents have highlighted that sometimes the whole agreement between the parties is not just contained in the lease document itself but also in side-agreements, letters and other correspondence. Therefore the lease document itself may not contain all the relevant information.</p> <p>Further, it may be more difficult for tenants to extract relevant information from sometimes, lengthy and complex lease documents (particularly if more than one lease is being searched).</p> <p>It would appear, that out of all of the options, this option is the least effective in achieving this particular policy objective of providing information that is relevant and up to date.</p>
Provides information about all retail shops	<p>This proposal is not limited to retail shops in shopping centres or groups of shops. However, it is noted that 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.</p> <p>Therefore, unless the TLA is amended, not all retail shop leases would be registrable under Option D.</p> <p>As such, Option D does not achieve the policy objective of providing information about all retail shops unless the TLA is amended.</p>
Information presented in usable format	<p>Under this option, parties will need to extract relevant information from the lease document – this may prove difficult for less sophisticated tenants. This option is also less accessible for searching variables.</p> <p>Professional bodies will be able to access information and provide reports and relevant information to tenants and landlords for a professional fee.</p> <p>Option D achieves this policy objective to a limited degree.</p>
Information is easily accessible	<p>Option D, being a public register should be easily accessible. The only potential barrier to access could be costs. The costs of searching the register (currently \$24 per document) could be prohibitive, particularly if multiple searches are required.</p> <p>Therefore, Option D may not be as effective as Option C in ensuring the lease information is easily accessible.</p>
Addresses confidentiality concerns	<p>Commercially confidential documents will be required to be registered and accessible for a search fee – currently registration is optional, allowing parties to choose not to register a lease or to lodge a caveat to protect their interests.</p> <p>Option D is not effective in meeting this objective.</p>
Cost effective	<p>The costs of Option D to tenants and landlords are likely to be greater than Option C. Therefore, this proposal is less effective in achieving this policy objective than Option C.</p> <p>Option D is not an elective option, therefore costs will be imposed across the industry, regardless of whether industry participants actually use information registered on the land title.</p>

Assessment of Option D against the objectives	
Provides for greater access to information to valuers to enable them to perform their functions in relation to retail leases	<p>Option D provides broad access to information for valuers across the retail tenancy sector. Option D provides access to source documentation, thus permitting valuers to assess lease information in context. However, some up to date lease information may not be included in the lease agreement itself.</p> <p>Option D is therefore somewhat effective at meeting this objective, although costs would be heightened in paying a valuer for searches.</p>

4.4.4 Productivity Commission views

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.

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. 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. Also, the mandatory registration of retail tenancy leases would invalidate any confidentiality provisions that have been included in contracts, limiting businesses’ freedom to contract.³²

The Productivity Commission concluded that compulsory registration on the title could not be justified. Implementation of Option D would not be consistent with the findings of the Productivity Commission.

4.5 Summary and comparison of costs

Option A (status quo) maintains the current situation in respect to the costs of accessing retail lease information. Tenants are currently able to utilise the services of lease information consultants, valuers, lease negotiators or other leasing professionals for a fee. Direct costs for Option A are likely to be negligible. It is possible that the indirect cost for landlords is the cost of disputation over retail leases – although it would be difficult to determine whether a particular disputation was the result of lack of access to lease information. Costs for government are not significant as there are no statutory obligations about lease information which require compliance activity. It is also possible that disputation costs will decrease as a result of the introduction of the Small Business Commissioner and the Amendment Act.

Option B (extend valuer access to information) imposes the greatest cost for tenants. If tenants choose to seek access to lease information the tenant will be required to appoint a valuer. This option will only deliver on the objectives if the tenant incurs significant costs. Government may incur some costs in relation to matters referred to the SAT.

32 Productivity Commission Report page 177

Option C (public lease register) will impose 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. Option C will impose a cost on Government for establishing and maintaining the register. To maintain accessibility of the database, it is unlikely that search fees would be charged on a full cost recovery basis. However, some costs to Government will be recovered through search fees. There is no way of knowing how many market participants will utilise the system. If only a small proportion of the market access the system, the net cost to Government could be significant. The gross costs of establishing and maintaining the database will remain fixed irrespective of the number of searches undertaken. Costs will also be incurred by Government in inputting and analysing the data so that information can be provided in a user friendly format.

Landgate has suggested that the Department of Commerce should maintain the register, therefore new systems would need to be established within the Department of Commerce. Government will also incur costs in relation to compliance and potentially could incur costs in relation to liability as a result of errors in the database.

Option D (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, particularly in relation to processing of leases lodged for registration. Government will also incur costs in relation to compliance. Some costs to Government will be recovered through search fees and registration fees. There are also indirect costs arising from loss of confidentiality.

Below is an indicative summary of the potential cost impact on landlords, tenants and Government of each of the options (except for Option A) outlined in this paper.

Costs to operate and maintain system and lodge information		OPTION B Increase valuer access	OPTION C Public lease register	OPTION D Mandatory registration on title
Establishment and first year	Government	\$465,000	\$2,760,000	\$1,750,000
	Landlords	\$306,250	\$3,500,000	\$10,500,000
	Tenants	-	-	\$5,600,000
Annual ongoing	Government	\$86,000	\$1,270,000	\$1,300,000
	Landlords	\$159,250	\$1,618,750	\$4,243,750
	Tenants	-	-	\$2,240,000

Note: some costs to Government for Options C and D will be recovered from industry (primarily tenants) through the payment of search fees and registration fees.

	OPTION B Increase valuer access	OPTION C Public lease register	OPTION D Mandatory registration on title
Estimated costs to access information or search register	3 hours at \$385 per hour = \$1155	Costs could possibly be set somewhere between \$30 and \$200 per report depending on the cost recovery model used.	Search fees are currently \$24 per document. It is anticipated that a tenant would need to obtain copies of several documents for comparative purposes. Fees may also be incurred in appointing a suitably qualified professional to analyse the lease documents. .

	OPTION A Status quo	OPTION B Increase valuer access	OPTION C Public lease register	OPTION D Mandatory registration on title
Tenant	Low-Medium	Medium-high	Low-medium	High
Landlord	Low	Medium-low	High	High
Government	Low	Low	High	Medium

4.6 Summary and comparison of options against the objectives

Below is a summary comparing Options B, C and D against each of the objectives. For more detailed analysis see Parts 4.2.3, 4.3.3 and 4.4.3.

	OPTION B Increase valuer access	OPTION C Public lease register	OPTION D Mandatory registration on title
Improves transparency of lease information and bargaining power of tenants	Will improve access to information for a limited range of tenants. Unlikely to be effective in achieving this objective.	Provides broad public access to lease information, thus permitting tenants to make more informed leasing decisions if they access that information. Achieves transparency, questionable as to whether bargaining power will be improved. Some respondents argue that it is more important for tenants to be fully aware of the implications of their own lease.	Provides broad public access to lease information, thus permitting tenants to make more informed leasing decisions if they access that information. Achieves transparency, questionable as to whether bargaining power will be improved. Some respondents argue that it is more important for tenants to be fully aware of the implications of their own lease.

	OPTION B Increase valuer access	OPTION C Public lease register	OPTION D Mandatory registration on title
Provides information that is relevant and up to date	Valuers will seek relevant information. Information will be valid and up to date at time of request. Achieves objective.	Broad access to information. Will need to be filtered in order for users to access relevant information. There may be some difficulties in ensuring that the information is up to date. Achieves objective to some degree.	Broad access to information. Will need to be filtered in order for users to access relevant information. There may be some difficulties in ensuring that the information is up to date. Achieves objective to some degree.
Provides information about all retail shops	Only provides information on shops in specific shopping centre/s. Not effective in achieving this objective.	Applies to all retail shops. Effective in achieving this objective.	Applies to all retail shops. However, unless the TLA is amended, only leases of more than 3 years will be able to be registered. Will only be fully effective in achieving this objective if the TLA is amended.
Information is easily accessible	Information only available through a valuer. Less effective than other options in achieving this objective.	Easily accessible to all users. Achieves this objective.	Should be easily accessible. The only potential barrier to access could be costs. Therefore, Option D may not be as effective as Option C in achieving this objective.
Information presented in usable format	Valuers would present information in a useable format. Likely to be effective in achieving this objective.	Likely that tenants will be able to undertake searches, based on certain variables, and obtain summary reports. Greater costs will be incurred by Government in providing reports in a user friendly format. Information not provided in context – could possibly be misleading. Effective to some degree in achieving objective.	Parties will need to extract relevant information from the lease document – this may prove difficult for less sophisticated tenants. This option is also less accessible for searching variables. Achieves objective to some degree (less effective than Options B or C).
Addresses confidentiality concerns	Effective to some degree in meeting this objective.	Provides broad access to commercially sensitive information. Confidentiality protected to some degree by keeping landlord and tenant details confidential. Questionable as to whether effective in achieving this objective.	Commercially confidential documents (entire lease agreements) will be required to be registered and accessible for a search fee. Not effective in meeting this objective.

	OPTION B Increase valuer access	OPTION C Public lease register	OPTION D Mandatory registration on title
Cost effective	Likely to be least cost effective for users accessing the information (tenants). Most cost effective option for Government.	Likely to be most cost effective tenants in accessing information. Imposes fairly significant costs on landlords (greater than Option B and lower than Option D). Costs will increase for landlords if requirements to update the database are imposed. Likely to be least cost effective option for Government.	The cost of Option D is likely to be greater than Option C for landlords and tenants and slightly lower for government. Therefore, this proposal is less effective in achieving this policy objective than Option C.
Provides for greater access to information to valuers to enable them to perform their functions in relation to retail leases	Effective to some degree in meeting this objective.	Provides broad access to information for valuers across the retail tenancy sector. However, information is not provided in context or with access to appropriate source documentation. Partially effective at meeting this objective.	Provides broad access to information for valuers across the retail tenancy sector. Provides access to source documentation, thus permitting valuers to assess lease information in context. May not provide completely up to date information on rent and other costs or on any 'side agreements'. Partially effective at meeting this objective.

5 CONSULTATION

5.1 Consultation Process

As part of the Regulatory Impact Assessment Process, a Consultation RIS canvassing three options for reform and one alternative option of maintaining the status quo (Option A) was released for a six week consultation period, ending 19 August 2011.

The Consultation RIS was distributed to 173 individuals and organisations comprising; industry participants and their representatives, Government agencies and members of Parliament.

The Consultation RIS was also published on the Department's website and an advertisement notifying the public of the consultation process was published in The West Australian newspaper on 23 July 2011.

5.2 Submissions received

The Department received 30 submissions on the Consultation Paper. The non-confidential submissions were published on the Department's website on 19 October 2011. The responses were divided between the sectors as follows:

- Retailers and their representatives – 13 submissions;
- Landlords and their representatives - 7 submissions;
- Property industry – 4 submissions; and
- Government and other – 6 submissions

Attachment 1 sets out an overview of all the submissions received and Attachment 2 identifies the broad views of the respondents.

Attachment 1 highlights that support (or qualified support) for the each of the options is divided as follows (it is noted that some respondents indicated support or qualified support for more than one option):

- 11 (36.7%) support Option A;
- 5 (16.7%) support Option B;
- 13 (44.3%) support Option C; and
- 10 (33.3%) support Option D.

These results indicate that there was no clear support for one particular option. Out of the 30 submissions, marginally, the most support received was for Option C.

A number of respondents also specifically indicated that they did not support particular options. These views are divided as follows:

- 11 (36.5%) indicated that they do not support Option A;
- 16 (53.3%) indicated that they do not support Option B;
- 12 (40%) indicated that they do not support Option C; and
- 11 (36.6%) indicated that they do not support Option D.

Therefore out of all of the options, Option C received the most support, but also a significant degree of opposition.

5.3 Small Business Development Corporation Survey

Given that the proposed options for reform are primarily aimed at assisting small business tenants by redressing the information imbalance between landlords and tenants, the views of small business tenants are particularly important to this consultation process. However, it should be noted that out of the 13 submissions received from the 'retailers and their representatives' group, only four respondents were small business tenants. This result is possibly reflective of the inherent difficulties in directly engaging small business owners, who often do not have the time or resources to participate in consultation.

To assist in directly eliciting responses from the small business sector and for the purpose of its own submission, the SBDC undertook a survey of 250 small business owners who lease retail shops in shopping centres. These small business owners were asked questions about their past behaviour and future intentions about seeking advice before signing their retail shop lease. The SBDC survey also investigated small business owners' views on the publication of their lease information. Where relevant, the views of these small business owners are reflected in this Decision RIS.

5.4 Stakeholder views – Option A – Status quo

Option A received support from 11 respondents (predominantly landlord representatives). Eleven respondents indicated that they do not support Option A (predominantly tenant representatives). It should be noted that the Law Society, the SBDC and Landgate all support Option A.

Some stakeholders are of the view that the amendments currently included in the Amendment Act (see Part 1.1.2 above) are sufficient to allow greater access to lease information and to improve the bargaining position of tenants and that some time should be allowed, after these amendments are implemented, to assess whether the amendments are sufficient in addressing the information gap.

Other stakeholders argue that greater access to information about other tenants' rental will not necessarily improve the position of small business and that resources could better be directed at providing appropriate business advice and other support for small business. It has been suggested that the difficulties facing some small business tenants are primarily attributable to a lack of understanding of the costs and other implications of their own leasing arrangements, rather than due to a lack of information about other tenants' leases.

Others can see the benefit in greater access to lease information, but are not convinced that these benefits would outweigh the costs of implementing Options B, C or D.

Those opposing Option A are of the view that some sort of reform is necessary to improve transparency of lease information.

5.5 Stakeholder views - Option B – Increase valuer access to information

As indicated above, Option B received very limited support, with only five respondents indicating support (or qualified support) for this option. Sixteen respondents did not support Option B.

Some of the key concerns with Option B include:

- the cost of appointing a valuer could be prohibitive for some tenants - of the respondents to the SBDC survey 83% indicated that they would be willing to pay a professional to get access to retail lease information, however, when asked how much they would be willing to pay, 47% said that they would be willing to pay up to \$300, while 13% indicated that they would pay over \$500. As stated previously, the *Land Valuers Licensing (Remuneration) Notice 2010* caps a valuers remuneration at \$385 per hour with more experienced valuers charging up to \$519.75 per hour with client approval – it is therefore likely that only a minority would be willing to pay an amount that properly reflects the actual cost of engaging a valuer;
- tenants are often represented by persons other than licensed land valuers (for example, a lawyer or leasing consultant) – these other representatives would not have access to lease information under Option B - the SBDC survey indicated that 64% of the respondents had sought professional advice before signing their current lease, however, only 2% had sought the advice of a valuer;
- difficulties in engaging the services of an independent valuer – some submissions indicated that a large number of valuers in Western Australia, represent or have represented the large landlords and therefore, they are excluded, due to a conflict of interest, from representing many tenants;
- perceived potential for misuse of lease information by competitors;
- information would only be available in relation to one sector of the retail tenancy market (i.e. leases for premises located in shopping centres); and
- the administrative costs and burden imposed on landlords providing the information.

5.6 Stakeholder views - Option C – Public lease register

Option C received the most support, with 13 respondents indicating that this was their preferred option for reform. The majority of support for Option C was received from the 'retailers and their representatives group'. Twelve respondents do not support this option, primarily landlord representatives. It should also be noted that the SBDC and the Law Society do not support Option C.

Key advantages of Option C identified by respondents include:

- provides for greater transparency in the retail tenancy market;
- information would be easily accessible;
- applies to all leases, rather than only those in shopping centres; and
- the information is likely to be available to tenants at a lower cost (compared to options 1 and 3).

Key concerns or objections identified in relation to Option C include:

- there could be significant costs to government in establishing and maintaining the database - number of respondents have queried whether the database could operate effectively on a cost recovery basis;
- would impose significant costs and an administrative burden on landlords;
- concerns about accuracy and currency of information – queries have been raised as to whether source documentation should also be lodged;

- potential for information to be misleading (if viewed out of context by persons who are not qualified to interpret the information);
- potential for misuse of information (by competitors);
- confidentiality concerns - the SBDC survey revealed there is significant sensitivity around the disclosure of lease information, particularly rent payable and any lease incentives. The below table shows the proportions of respondents to the SBDC survey who would allow and object to various aspects about their lease being made available to others.

	Allow %	Object %	Don't know %
Rent payable	47	51	1
Length of lease	63	35	2
Location of premises	80	18	2
Negotiated incentives	47	50	4
Method of rent review	59	37	4
Contribution to marketing promotional funds	53	42	5
Option periods	55	41	4
Details that could identify your business such as your business name	55	43	2

- the publication of information, particularly specifically negotiated incentives, may impact on a landlord's willingness to negotiate;
- it is an unnecessary intervention in the market;
- difficulties in ensuring compliance; and
- the proposal is inconsistent with other jurisdictions in Australia.

Some Government agencies, including Landgate and the SBDC, expressed the view that the costs of implementing Option C are likely to outweigh any benefits.

Whilst several respondents suggested that Landgate should administer any public lease register, Landgate has indicated that it is of the view that the agency responsible for the administration of the Commercial Tenancy Act³³ should be responsible for maintaining the lease register database, possibly in collaboration with Landgate.

³³ Currently the Department of Commerce.

5.7 Stakeholder views - Option D – Mandatory registration on title

Option D received support (or qualified support) from 10 respondents. 11 respondents indicated that they do not support Option D. Support for Option D was received from both landlords and tenants (and their representatives), with opposition to the proposal evenly spread across the industry sectors. It should be noted that Landgate, the SBDC and the Law Society do not support Option D.

Key advantages of Option D, identified by respondents, include:

- administrative procedures are already in place in WA;
- the entire lease agreement is registered, the lease information can therefore be viewed in context; and
- fairest option, as the costs are shared between the landlord and tenant (tenant pays registration costs and landlord arranges for registration).

Key concerns or objections in relation to Option D include:

- confidentiality concerns around registering whole leases (see the results of the SBDC survey noted at Part 5.3 above);
- the high costs associated with registering and accessing leases, along with monitoring and compliance costs (likely to be paid by tenants);
- difficulties associated with maintaining current and comprehensive material on the register, which increases the scope for misinterpretation;
- capturing leases with initial terms of less than three years would require amendment to the TLA; and
- increased costs to Landgate in processing registrations and requests for information.

5.8 Other options raised during consultation

Some of the submissions received in response to the Consultation-RIS proposed alternative options for improving access to retail lease information in Western Australia. These proposals included the following:

5.8.1 *Public register of disclosure statements*

Currently, landlords are required under the legislation to provide tenants with a disclosure statement prior to the execution of the lease. The disclosure statement document contains key lease information and shopping centre data. One stakeholder has suggested that rather than requiring landlords to extract and submit specified lease information into a public database, it would be less onerous on landlords and more effective in increasing access to lease information, if landlords were required to lodge the disclosure statement document.

One of the key benefits of this proposal is that it would reduce the administrative burden and cost on landlords as they are already required to provide tenants with a disclosure statement. However, further consideration would need to be given to whether it is appropriate to include all the information contained in a disclosure statement on the register. In particular, some stakeholders have already indicated concern about including the name and address of the tenant and other key lease terms such as lease expiry date, on a public database.

5.8.2 Rental register

Another proposal which was raised during the consultation process³⁴ is to establish a de-identified register which contains aggregated rental information for all retail spaces in Western Australia.

The key features of the proposed register include the following:

- registration would be mandatory for all retail shops;
- the confidential lease register would be overseen by a government or statutory authority (confidentiality of information would be maintained in relation to the names of the parties and commencement and expiry dates for leases);
- access would be available to the rental component of the register, for a fee, and would be provided as de-identified aggregated rental information (benchmarks);
- the information to be available would relate to rent paid per square metre and would be sorted into range categories which could include for example size of shops, size of shopping centres, number of shops, inner/outer metro/rural/remote location and type of business – by retail category;
- the information would provide ranges, medians, and average rents for all retail spaces across Western Australia; and
- operating expenses and other costs incurred by tenants would also need to be included in the register.

The potential benefit of this proposal is that it would provide broad access to rental information whilst overcoming the concerns some stakeholders have expressed in relation to confidentiality of information. However, there may be an issue with respect to the utility of the register particularly given that the information will be in aggregated form and may be provided out of context and, therefore, may be misleading.

This proposal would also be particularly costly for the Government given that a government agency would be required to extract and analyse data on an ongoing basis. The database required to collect this data and produce these reports would be costly to establish and maintain.

There could be a significant administrative cost for landlords. However, this cost may be reduced if the landlord could submit an existing document such as the disclosure statement.

If some form of public database of lease information was to be developed, this proposal may potentially have less of a negative impact on the industry than Option C in the Consultation-RIS. However, it is likely that the costs of this option would outweigh the potential benefits to small business.

5.9 Conclusion

The submissions revealed that views on the options are divided with no clear support for one option over another. To some extent, this outcome reflects the divergence of interests in the retail sector.

³⁴ Pharmacy Guild of Australia (WA Branch)

6 PREFERRED OPTION

The Department has considered all options and based on stakeholder feedback and a consideration of policy issues, makes the following recommendations:

- Option A - Maintain the status quo - should be supported;
- Option B - Increase valuer access to information - should not be supported;
- Option C - Public lease register - should not be supported; and
- Option D - Mandatory registration on land title - should not be supported.

6.1 Option A – Status quo

Option A maintains the status quo with no introduction of any additional legislative reforms, apart from those amendments currently included in the Amendment Act.

The second most support was received for Option A. Key stakeholders in favour include: Real Estate Institute of Western Australia (REIWA); the SBDC; and the Law Society.

When the Amendment Act comes into effect, the status quo position will improve as a range of significant additional protections and rights will be afforded to tenants. In addition to the amendment directed at providing lease information to valuers, the Amendment Act also includes a number of amendments aimed at redressing the imbalance in bargaining power between landlords and tenants.

Further, the creation of the Small Business Commissioner will also assist small business retailers in their dealings with landlords, by providing advisory and mediation services.

In the Commonwealth Government's response to the Productivity Commission's report (see Part 1.4.2), the Commonwealth expressed the view that the recommendation to create a lease database should only be pursued if it could be assured that it offers net benefits to retail tenants.

Whilst it is recognised that there is information asymmetry in the retail tenancy market, with landlords having an advantage over tenants, this information imbalance does not appear to justify legislative intervention (including the creation of a compliance regime under the Commercial Tenancy Act). The costs involved in implementing Options B, C or D, including the loss of confidentiality in relation to commercially sensitive information, appear to outweigh any benefit that might accrue from greater access to information.

It has been argued that tenants might be better served in seeking advice about the implications of their own lease agreement and ensuring that this is suitable for their circumstances, rather than examining the details of other retailers' leases.

Of the submissions received in response to the consultation paper, 13 were received from retailers or their representatives, of these only four were received from small business retailers themselves. This may be an indicator that access to lease information is not a significant issue for most tenants. In addition, the Department has not been contacted by retailers raising concerns about this issue.

It may be more appropriate, at this stage, to give the current proposed reforms (including the establishment of the Small Business Commissioner) time to have an impact in the retail tenancy market and revisit the question as to whether Option C should be implemented at a later date, if there is a demonstrated need to address the issue.

If Option A is adopted, the Department could also continue to work with the SBDC to consider other measures to support small business.

6.1.1 *Examples of other measures to improve access to lease information*

The 2003 Review Committee, whose recommendations form the basis of the current Amendment Act, also made a number of recommendations for improving the disclosure of information to tenants via the disclosure statement and tenant guide forms currently contained in the regulations to the Commercial Tenancy Act.

Some of the additional information the Review Committee recommended landlords should disclose in these documents include:

- whether there are restrictions on the provision of certain goods or services by tenants;
- clearer identification of those costs to be borne by the tenant and those to be borne by the landlord under the lease;
- the location of common areas and kiosks on an attached floor plan; and
- whether there are any proposed changes to the current tenancy mix.

The Department intends to implement these amendments to the regulations and they will come into effect at the same time as the Amendment Act.

If Option A is adopted, then it should be noted that these additional disclosure requirements, to be included in the regulations, may go some way to ensuring tenants are better informed of the hidden costs and other implications of their lease.

In addition to these proposed regulatory amendments, the Department is consulting with the SBDC to determine whether any additional disclosures could be included in these documents to address the specific issue of improving access to lease information (for example average rental information for shopping centres i.e. average lease term, option period, rent payable etc).

6.1.2 *Preferred option*

Based on stakeholder feedback and a consideration of policy issues, Option A is the preferred option at this time.

6.2 Option B - Increase valuer access to lease information

It is noted that there is limited support for Option B as stakeholders have expressed concerns about the accessibility and effectiveness of this option.

Key limitations to the effectiveness of Option B include:

- information will only be provided to licensed valuers, but at present, tenants generally do not seek the advice of valuers prior to entry into a lease, the costs of engaging a valuer could be prohibitive and represent an additional cost impost, and other lease advisors will not have access to the same lease information; and
- information will only be available about retail shops located in shopping centres and therefore will not provide a complete picture of the retail tenancy market.

Option B is therefore not the preferred option.

6.3 Option C – Public lease register

The most support (by a small margin – 13 compared to 11) was received for Option C. However, it should also be noted that over one third of respondents to the Consultation Paper, including notably the Law Society and the SBDC, did not support Option C.

A significant advantage of Option C is that it is specifically tailored to provide broad access to relevant lease information; however, some stakeholders question whether access to more information would actually improve the bargaining power of tenants to any significant degree.

Confidentiality concerns would also need to be taken into account. However, some of these concerns could possibly be addressed by considering the suggested alternative (arising out of the consultation) outlined at Part 5.8.2.

Analysis of the costs involved in implementing Option C reveal that there could be a significant cost impost on the Government and industry.

In order to provide information in a useable format, the database would need to be established with relatively sophisticated reporting functionality. Market participants would need to be able to enter relevant search parameters or filters (such as lettable area, location or business type) and obtain a summary report in relation to leases falling within those parameters. If the option outlined at Part 5.8.2 were implemented – with access being provided to de-identified aggregated lease information – further analysis of the relevant data would be required in order to develop appropriate reports. This option would also be more costly for Government as additional, specialised resources would be required to analyse and process the data.

Significant costs would also be incurred in establishing a compliance regime in relation to the registration requirements. The Commercial Tenancy Act does not currently include any offences or compliance provisions, all remedies in relation to non-compliance with the Act are between the parties (for example, provisions are deemed to be void or compensation is payable). If a compliance regime were to be introduced, significant amendment of the Commercial Tenancy Act would be required and the Department would need to establish a compliance unit in relation to commercial tenancy matters. If compliance mechanisms are introduced into the Commercial Tenancy Act in relation to any lease registration requirements, it is likely that there will be pressure from industry to revise the whole Commercial Tenancy Act and introduce penalties in relation to other matters³⁵.

It is estimated that it would cost approximately \$2.76 million to establish the register. This cost would comprise of; development of systems technology to support the database; an education campaign; and additional staffing. There would also be estimated recurrent costs of approximately \$1.27 million per annum to employ resources to maintain and administer the register. Based on the recurrent cost of the system, estimates of costs based on a full cost recovery model would likely set search fees in the range of \$330 - \$1,650. These fees are prohibitive, therefore full cost recovery is not recommended. There will be some capacity to offset the recurrent costs of the database through user pay access to reports. The precise extent of this offset will depend upon the cost per report and the extent of demand for reports. These figures are difficult to quantify at this stage.

³⁵ In other jurisdictions penalties are imposed for matters such as failure to provide a disclosure statement, disclosure of turnover information by a landlord, seeking or accepting payment of key money and unlawful use or disclosure of lease information by a valuer.

The requirement to lodge specified lease information may also have a significant cost impact on landlords. It is estimated that the total cost to landlords in Western Australia could be up to \$1.6 million per year (assuming an average five year lease term and approximately 350,000 retail shop leases³⁶).

This cost would increase significantly at the time of establishment if the requirement to lodge the lease information applies to existing as well as new leases. In this case, the initial total cost to landlords could be in the range of \$3.5 million. It should be noted that if the requirements do not apply to existing leases, it will be a number of years before the database can be of any real value to tenants.

The direct costs to tenants are likely to be minimal as it is anticipated that there will be a nominal fee to search the register. Search costs could possibly be set somewhere between \$30 and \$200 per report depending on the cost recovery model used, the level of utilisation of the system by industry and the complexity of reports generated. If usage rates are low, costs to Government will increase.

Some stakeholders have suggested that a public lease register will create indirect costs for the industry. For example, it has been suggested that the increase in costs to landlords of complying with the requirements of a public lease register will be passed on to tenants in the form of increased rent. It has also been suggested that the potential for tenants to misinterpret the lease information may lead to an increase in disputation between the parties and resulting litigation costs.

The costs of implementing Option C appear to outweigh the benefits that might arise if Option C were implemented. Option C is therefore not supported.

6.4 Option D – Mandatory registration of leases on the title

Option D received a reasonable degree of support from stakeholders, however, key stakeholders such as Landgate, the Law Society and the Small Business Development Corporation (SBDC) oppose it.

In addition, in 2008 the Productivity Commission considered whether mandatory registration on the title was an appropriate mechanism for improving availability of lease information and concluded that it could not be justified, as the costs would outweigh any benefits.

Mandatory registration of leases on the title does not appear to be the most appropriate mechanism for achieving greater access to lease information, as the legislation and administrative processes concerning registration are not primarily intended to provide comparative lease information. It can be argued that mandating registration of leases on the title is a cumbersome way to improve access to lease information. Concerns have also been raised about the unintended consequences that might flow from mandating registration on the title (such as availability of commercially confidential information and the costs of both registering and surrendering leases). In addition, registration on title may not necessarily provide access to all up to date information, such as most recent rental values or details not contained in the formal lease agreement.

Given the above, there is no clear basis to support Option D.

³⁶ This figure is based on Productivity Commission estimates – see Productivity Commission Report page 13

7 IMPLEMENTATION AND EVALUATION STRATEGY

7.1 Implementation

Implementation of any of the options (except for Option A, status quo) would require the drafting, and enactment by Parliament of amendments to legislation, principally the Commercial Tenancy Act. There may be a need for consequential amendment of other legislation, subject to advice on the option adopted.

Option C (Public Lease Register) would 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 D (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 have 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 Australian legislation. Depending on the option adopted, it may be appropriate to undertake evaluation within a reasonable period of time, for example 1-2 years after commencement.

The implementation of Option A (status quo) does not require further legislative intervention.

Regardless of which option is adopted (including Option A) the Government is committed to implementing its current reform package aimed at benefiting small business. In particular, the changes included in the Amendment Act (due to commence later in 2012) and the creation of the Small Business Commissioner (which commenced operations in late March 2012) are intended to improve the bargaining power of tenants and increase tenants' access to advisory and mediation services.

The effectiveness of the Amendment Act will be monitored and a post implementation review will be undertaken as part of the next review of the Commercial Tenancy Act.

The Small Business Commissioner will monitor disputes in relation to commercial tenancy issues. In addition, the statutory functions of the SBDC include investigating and reporting on:

- the impact of legislation and government policy on small business; and
- emerging trends in market practice that have an adverse effect on small business.

This information will assist the Department in indentifying recurrent market issues and to assess the effectiveness of the Act and amendments.

ATTACHMENT 1 – OVERVIEW OF SUBMISSIONS

Stakeholder group	Option A		Option B		Option C		Option D	
	Maintain status quo		Increase valuer access to information		Public lease register		Registration on title	
Retailers and their representatives (13 submissions)	Supported	1	Supported	2	Supported	8	Supported	4
	Qualified support		Qualified support	1	Qualified support	1	Qualified support	1
	Not supported	7	Not supported	4	Not supported	1	Not supported	3
	No clear view	5	No clear view	6	No clear view	3	No clear view	5
Landlords and their representatives (7 submissions)	Supported	6	Supported		Supported		Supported	3
	Qualified support		Qualified support		Qualified support		Qualified support	1
	Not supported		Not supported	7	Not supported	7	Not supported	3
	No clear view	1	No clear view		No clear view		No clear view	
Property industry (4 submissions)	Supported	1	Supported	1	Supported		Supported	1
	Qualified support		Qualified support		Qualified support	1	Qualified support	
	Not supported	3	Not supported	2	Not supported	2	Not supported	2
	No clear view		No clear view	1	No clear view	1	No clear view	1
Other (Law Society, SBDC, Landgate, National Party, small business representatives) (5 submissions)	Supported	3	Supported		Supported	2	Supported	
	Qualified support		Qualified support	1	Qualified support	1	Qualified support	
	Not supported	1	Not supported	3	Not supported	2	Not supported	3
	No clear view	1	No clear view	1	No clear view		No clear view	2
Total	Supported	11	Supported	3	Supported	10	Supported	8
	Qualified support		Qualified support	2	Qualified support	3	Qualified support	2
	Not supported	11	Not supported	16	Not supported	12	Not supported	11
	No clear view	7	No clear view	8	No clear view	4	No clear view	8

NOTE: The figures above have been calculated based on those submissions in which a clear view was expressed by the respondent in relation to a particular option. In those instances where a clear view was not identifiable, the response has been recorded as “no clear view”. The views of the State Administrative Tribunal have not been included in these calculations.

ATTACHMENT 2 – SUMMARY OF STAKEHOLDER VIEWS

Stakeholder	Option A	Option B	Option C	Option D	General comment
	Maintain status quo	Increase valuer access to information	Public lease register	Registration on title	
Retailers and their representatives					
Lease One (retailer representative)	Not supported (but preferable to Option B)	Not supported	Supported	Qualified support	Suggests registration of disclosure statement.
Pharmacy Guild	Not supported	Not supported	Supported	Not supported	
Australian Retailers Association (ARA)	-	-	Supported	-	
Retail Traders Association (RTA)	Not supported	Qualified support	Qualified support	Not supported	
National Retail Association	Not supported	Not supported Many tenant advisors are not licensed valuers.	Supported	-	
Franchise Council of Australia	Not supported	Supported (preferred option)	Supported	Supported	Supports shopping centre register proposal in 2010 Position Paper.
WA Retailers Association	Not supported	Not supported	Supported (preference)	Supported (hybrid with Option C)	
Western Australian Newsagents Association Inc			Supported (implemented through Option D)		
James O'Neil (property administrator for Vodafone)	-	-	-	Supported	
Hype DC Pty Ltd (retail footwear business operating from 33 leased stores across Australia)	-	-	-	Supported	Outlines difficulties for tenants arising from imbalance in market power. Will help if tenants can enter negotiations armed with the facts about market rents.
Biff Brody (franchisor)	Supported	-	-	-	It would be better if tenants got some financial advice and see a cash flow of their business before signing a lease – lawyers only look to see if the lease complies with the law, tenants need more than that.

Stakeholder	Option A	Option B	Option C	Option D	General comment
	Maintain status quo	Increase valuer access to information	Public lease register	Registration on title	
Savour (restaurant and catering representative)	-	-	Supported	-	Notes that NSW, Qld and Vic have adopted uniform disclosure statements. Uniformity on a national level and a national registry should be considered.
Kathryn Gleeson (Special Occasions)	Not supported	Supported	Not supported	Not supported	
Landlords and their representatives					
Shopping Centre Council of Australia	Supported - do not believe a substantial case has been made out that greater lease transparency will bring major benefits to retailers.	Not supported Many tenant advisors are not valuers.	Not supported	Supported – but not convinced that significant benefits will accrue to tenants from this option.	
Colonial First State	Supported	Not supported	Not supported	Qualified support (second preference)	Supports provision of information to valuers on principles set out in sections 37 and 38 of Vic Act. <i>(Note - this is equivalent to current amendment in Amendment Act).</i>
AMP Capital Shopping Centres (Garden City, Karrinyup, Ocean Keys)	-	Not supported	Not supported	Supported	
Bekhor Holdings (owner of small retail shopping centre - 9 shops)	Supported	Not supported	Not supported	Not supported	
Maylands Park Shopping Centre	Supported	Not supported	Not supported	Not supported	
Mrs B Saker (small retail lessor)	Supported	Not supported	Not supported	Not supported	As a small retail lessor, object to having privacy invaded and oppose lease register. Lease register will not affect the rents either Coles or the small retailers will pay

Stakeholder	Option A	Option B	Option C	Option D	General comment
	Maintain status quo	Increase valuer access to information	Public lease register	Registration on title	
Property industry – valuers and property consultants					
Australian Property Institute	Not supported	Supported	Not supported	Not supported	Supports options one. Significant reservations about options 2 and 3. If a well constructed version of Option B does not address the perceived imbalance, Options 2 or 3 could be considered at a later date. Any register should only be accessible by valuers.
Australian Lease & Property Consultants Pty Ltd	Not supported	No preference stated	No preference stated	No preference stated	No preference stated for a particular option. However, the ALPC advocates greater transparency and disclosure of lease information.
Real Estate Institute of Western Australia	Supported	Not supported	Not supported	Not supported	Would support basic information being available on retail industry segments – only averages across sectors or locations as to rental value and lettable area. Data base to be administered by Government – voluntary lodgement of information.
Other organisations					
Landgate	Supported	Not supported	Qualified support. Supports concept, but notes that costs may outweigh benefits.	Not supported.	
Small Business Development Corporation	Supported	Qualified support	Not supported	Not supported	
Combined Small Business Alliance			Supported		
Parliamentary National Party of Australia	Not supported	Not supported	Supported	-	In the interests of preserving small business and market competitions, there should be a completely open system.

Stakeholder	Option A	Option B	Option C	Option D	General comment
	Maintain status quo	Increase valuer access to information	Public lease register	Registration on title	
The Law Society	Supported	Not supported Only supports mandatory disclosure of information to valuers who are determining rental on a market review (amendment in Amendment Act).	Not supported	Not supported	

NOTE: Details of confidential submissions have not been included in this summary.

