Law Council
OF AUSTRALIA

Harmonisation of retail tenancies and related commercial leasing

Treasury

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Executive summary

1. The Law Council supports consideration of opportunities to achieve greater consistency in retail tenancy regulation across Australia. Greater consistency has the potential to reduce complexity and compliance costs, particularly for landlords, tenants and advisers operating across multiple jurisdictions. However, harmonisation should not be pursued for its own sake. The benefits of reform will depend on the substantive content of any harmonised framework, the protections it provides, and the compliance burdens it may reduce or impose.

2. The benefits of harmonisation are unlikely to be distributed evenly. They are likely to be greatest for parties operating across multiple jurisdictions, while landlords and tenants whose activities are confined to a single jurisdiction may incur transition and compliance costs without obtaining the same benefits from national consistency. Reform should therefore be directed towards substantive improvements in retail tenancy regulation, having regard to the different impacts of reform on parties operating nationally and those whose activities are confined to a single jurisdiction.

3. Feedback to the Law Council through this consultation process has identified several areas in which greater national consistency may be beneficial. In particular, there is support for greater consistency in the scope and coverage of retail tenancy legislation and in pre-lease disclosure requirements. Other areas identified for potential alignment include elements of lease terms and renewal processes, rent review, outgoings, assignment processes and minimum standards for dispute resolution.

4. While there is a degree of divergence in relation to the most appropriate model for achieving greater national consistency, there is considerable support for a model law based on a national minimum baseline. This approach is likely to be the most workable, having regard to the need to reach agreement among the States and Territories, each of which already has an established legislative framework. However, there is also some support for a single Commonwealth law applying nationally and replacing State and Territory retail tenancy legislation. This view, however, acknowledges the practical difficulties associated with this approach, and notes that if a single national law is not achievable a model law with national minimum baselines may be a more practical approach.

5. Regardless of the model pursued, careful implementation will be critical. Retail leases are long-term contractual arrangements, and reforms will require appropriate transitional arrangements, sufficient implementation time and consideration of their effects on existing documentation, processes and industry participants. Any national framework will also require governance arrangements capable of maintaining alignment over time and managing the risk that jurisdictions may subsequently diverge from an agreed position.

Introduction

6. The Law Council welcomes the opportunity to provide feedback on Treasury's consultation paper *Harmonisation of retail tenancies and related commercial leasing* (**Consultation Paper**).

7. Treasury's consultation forms part of the broader National Competition Policy reform agenda and seeks views on possible reforms to improve consistency across State and Territory retail tenancy frameworks. In some jurisdictions, this includes related commercial leasing settings where retail and commercial protections extend beyond a narrow retail-only model.

8. This submission draws on feedback from the legal profession, reflecting differing jurisdictional experiences and, in some instances, differing views about the desirability and appropriate form of harmonisation. The submission identifies areas in which greater consistency may be beneficial and highlights matters requiring careful consideration in the design, implementation and ongoing governance of any national framework.

General observations on harmonisation

9. There are clear benefits from greater consistency in retail tenancy regulation, particularly for landlords, tenants and advisers operating across more than one jurisdiction. A more consistent framework has the potential to reduce the need to navigate materially different rules, streamline transaction processes and documentation, and lower legal, administrative and compliance costs. Disclosure requirements are one area in which inconsistent forms, strict timing and sequencing rules can increase complexity and cost.

10. Those benefits should not, however, be assumed to flow from harmonisation itself. As observed in the feedback we have received, harmonisation should not be pursued for its own sake without due consideration to best practice. The content of any harmonised framework—including the protections it provides and the compliance burdens it imposes—will be critical.

11. The benefits are also likely to be distributed unevenly and will be most apparent for multi-jurisdictional operators, although some larger national tenants may be excluded from retail tenancy protections under corporate-status, rent or other thresholds. By contrast, many small and medium-sized tenants lease only one or a few premises in a single jurisdiction, and many smaller landlords own property in only one jurisdiction. For those parties, the substantive protections, clarity and compliance burden of the regime are likely to matter more than whether national harmonisation is achieved.

12. Reform must accordingly remain focused on the protective purpose of retail tenancy legislation, and the practical needs of small and medium-sized landlords and tenants. Any efficiency gains for national operators should be weighed against the risk of additional cost, complexity and red tape for the many parties whose leasing activities are confined to one jurisdiction.

13. Feedback to the Law Council has generally supported efforts to harmonise, however there is a diversity of views as to the extent and form that this should take. While a single consistent framework may be desirable, national consistency in selected core areas could reduce compliance costs while maintaining substantive protections and jurisdiction-specific flexibility. On that basis, a model law and national minimum baseline, broadly corresponding with Option B in the Consultation Paper, is likely to be more achievable than a single national law.

14. Further, complete uniformity could limit the capacity to accommodate jurisdiction-specific market conditions and policy objectives and could result in the loss of existing protections. The limited benefits available to national operators of complete uniformity may not justify the costs, risks and additional red tape that harmonisation could impose on small and medium-sized landlords and tenants.

15. We note that previous attempts towards greater consistency in retail tenancy laws demonstrate the difficulty of achieving and maintaining harmonisation. For example, the national project to develop a harmonised disclosure statement, undertaken by the National Retail Tenancy Working Group established by the Council of Australian Governments in 2008—resulted in adoption by only New South Wales, Queensland and Victoria from 2011;[1] Victoria subsequently adopted more tailored statements, and possible changes have been raised in the recent review of the *Retail Leases Act 1994* (NSW).[2] This experience suggests that any harmonisation project will require sustained commitment, resources and coordination across participating jurisdictions.

16. If full harmonisation is not able to be achieved, there are several areas in which greater national consistency may be beneficial, including clearer definitions and guidance for contemporary leasing models; proportionate and streamlined disclosure requirements; clearer minimum lease standards; timely, proportionate and cost-effective dispute resolution pathways; and the removal of unnecessary duplication or inconsistency between retail leasing disclosure requirements and the Franchising Code of Conduct under the *Competition and Consumer (Industry Codes—Franchising) Regulations 2024* (Cth). These issues may be considered as targeted minimum standards without assuming that every aspect of each jurisdiction's regime should be identical.

17. Finally, transition to a new framework would require particular care. Retail leases are long-term contracts, and a new framework would need to address its application to existing leases, renewals and variations without cutting across accrued rights or creating prolonged parallel regimes. Constituent feedback warns that unclear or complex transitional provisions could generate significant ongoing compliance costs and disputes.[3] Any national reform should therefore be supported by clear, workable and carefully consulted transitional arrangements.

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1 Productivity Commission, Economic Structure and Performance of the Australian Retail Industry (Report No 56, 4 November 2011) 267.

2 NSW Small Business Commissioner, Review of the Retail Leases Act 1914 (Report, July 2023) 34-35.

3 See, for example, *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd & Ors* [2017] SASC 72. Also see *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd* [2023] SASC 66 and *Gouger Street Pty Ltd v Diakou Nominees Pty Ltd* [2024] SASCA 17.

Consultation questions

18. The Consultation Paper contains a series of questions on a range of issues. Below are the Law Council's responses.

Economic and market context questions

> **1. What are the most reliable contemporary data sources to estimate the number, characteristics and trends of regulated retail leases in Australia? Please indicate coverage, frequency, limitations and whether the data supports trend analysis.**

19. Contemporary data sources for regulated retail leases in Australia are likely to vary between jurisdictions and may be limited in the extent of reliable data they can provide. Data sources may include State and Territory land titles registers and administrative records held by retail tenancy regulators and small business commissioners.

20. For example, the Victorian Small Business Commissioner (**VSBC**) and Victorian Civil and Administrative Tribunal (**VCAT**) can provide reliable dispute resolution data for retail leasing in Victoria, including the number and types of retail leasing disputes in Victoria and resolution timeframes.

> **2. What minimum data items would enable consistent national comparison of lease terms, occupancy costs and dispute outcomes across jurisdictions? Please indicate which items are feasible to collect consistently.**

21. Data items could include:
    - rent (including whether there is any component of turnover rent);
    - rent review mechanism;
    - outgoings;
    - length/term of lease;
    - option rights;
    - security (type and amount);
    - insurance requirements;
    - redevelopment and demolition rights;
    - permitted use; and
    - assignment rights.

22. Significant difficulties are likely to be encountered in trying to collect such data due to privacy and confidentiality concerns. If the land registries are to be considered as a potential data source, a practical limitation would be that some jurisdictions do not require leases to be registered. For example, in Victoria there is no mandatory requirement to register leases, and in New South Wales, paragraph 42(1)(d) of the *Real Property Act 1900* (NSW) protects certain unregistered tenancies not exceeding three years, including any option terms in aggregate, from being defeated by a

subsequent registered proprietor. A lease exceeding three years in aggregate falls outside that protection and generally requires registration to bind a subsequent registered proprietor. Section 16 of the *Retail Leases Act 1994* (NSW) also requires certain retail leases to be registered.

23. The differing approaches to registration across jurisdictions do not support introducing a national requirement for the registration of retail leases. Different requirements nationally as to whether retail leases are registered make land registries an incomplete data source. In addition, a registered lease may not be readily identifiable as a regulated retail lease or an unregulated retail lease or commercial lease.

Divergence questions

3. What are the top three divergences across jurisdictions that impose the greatest practical costs or uncertainty? If possible, for each divergence, please provide:
a. how often it arises (for example, per cent of leases or transactions)
b. the main impact (cost, delay, dispute, uncertainty)
c. indicative magnitude (for example, legal costs, compliance costs, time delays)
d. affected groups.

24. We have identified four principal areas of divergence that give rise to practical costs or uncertainty: the scope and application of retail tenancy legislation; disclosure requirements when entering into a retail lease; statutory minimum lease terms; and assignment requirements. Although the Consultation Paper asks respondents to identify the top three divergences, feedback to the Law Council did not disclose a consistent view as to which three should be prioritised.

25. These divergences are particularly relevant to landlords and tenants operating across multiple jurisdictions, as they affect whether the legislation applies, the processes and documents required to enter into or assign a lease, and the parties' rights and obligations. They also affect legal practitioners advising those parties and preparing the relevant documentation.

Scope and application of legislation

26. Differences in legislative scope, coverage and exclusions create uncertainty about whether particular premises or businesses are subject to retail tenancy legislation. For example, jurisdictions define key concepts including "retail premises" differently, which can cause particular difficulty for businesses operating across multiple jurisdictions. In Victoria, whether particular premises fall within the scope of the *Retail Leases Act 2003* (Vic) has been the subject of litigation.[4] These differences may increase legal and compliance costs and expose parties to disputes about whether the legislation applies.

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[4] *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2017] VSC 23; *Phillips v Abel* [2019] VCAT 1031.

Disclosure requirements

27. Disclosure requirements when entering into a retail lease also differ between jurisdictions, including as to the timing and content of the information that a landlord must provide to a tenant. These differences can create uncertainty and practical difficulty for landlords and tenants operating across multiple jurisdictions, and for the practitioners advising them. They may affect transaction timelines, and require jurisdiction-specific documentation and advice. Non-compliance may have significant consequences, including giving a tenant a right to terminate the lease or seek compensation for loss.

Statutory minimum lease terms

28. There are also differences in statutory minimum lease terms. For example, Victoria generally provides for a minimum five-year term, including options, unless the tenant obtains a waiver certificate from the VSBC. New South Wales, Queensland, and Western Australia do not impose an equivalent statutory minimum term. These differences may affect the lease term available to the parties and introduce an additional administrative step where a tenant in a jurisdiction with minimum lease terms seeks a shorter lease.

Assignment requirements

29. Assignment processes are a further area of divergence, particularly the grounds on which a landlord may withhold consent and whether the outgoing tenant and any guarantor are released from liability from the date of assignment. Differences in these requirements may affect the transaction timeline, the documentation required and the advice provided to the parties. They may also create uncertainty about the continuing liability of an outgoing tenant or guarantor after an assignment.

Legislative scope and coverage questions

4. Which aspects of scope and coverage (definitions, thresholds, exclusions, shopping centre triggers or more integrated frameworks) most commonly lead to different outcomes across jurisdictions, and what practical impacts do they have? Please provide:
a. examples and frequency where possible
b. compliance, legal or administrative impacts
c. documentation or process complexity
d. delays or uncertainty
e. any effect on dispute incidence.

30. Retail tenancy legislation was originally introduced in part to respond to concerns about the imbalance in bargaining power between retail landlords and tenants, particularly small retailers leasing premises in shopping centres. It provides regulated tenants with statutory rights and protections that may not be available under an ordinary commercial lease. Whether a lease falls within the relevant legislation can therefore have significant consequences for the parties' rights and liabilities. For example, in Victoria, a tenant under a regulated retail lease cannot be required to pay

land tax or capital costs, is not liable for outgoings unless provided with an annual estimate, and is entitled to have the landlord maintain the premises in the condition required by the legislation.[5] Feedback we have received indicates that differences in the definitions, thresholds and exclusions used by state and territory legislation can lead to materially different outcomes. A tenant holding similar leases in two jurisdictions may be regulated as a retail tenant in one jurisdiction but not another, creating particular uncertainty for landlords, tenants and advisers operating across multiple jurisdictions.

31. Approaches used to determine coverage generally involve either a prescribed list of retail uses or a broader definition of retail activity, supplemented by inclusions, exclusions or thresholds. Those thresholds may refer to matters such as the tenant's corporate status, the lettable area of the premises, annual rent or total occupancy costs. This approach can produce anomalous outcomes. Prescribed lists may become outdated as business models evolve, while broad definitional approaches may extend protection to businesses or premises that would not ordinarily be regarded as retail.

32. Feedback to the Law Council identifies differences in the treatment of large or sophisticated tenants. In Victoria, Western Australia and South Australia, entities listed on recognised stock exchanges, and their subsidiaries, are excluded from regulation. This may result in substantial unlisted entities being regulated as retail tenants despite having operations comparable to, or larger than, some listed retailers. Conversely, New South Wales does not exclude tenants solely because they are ASX-listed. Accordingly, a large listed retailer may be regulated in New South Wales where the relevant premises have a lettable area of less than 1,000 square metres and no other exemption applies.[6]

33. Coverage may also turn on the location or characteristics of the premises. For example, in Victoria a professional services firm located on the second floor of an office building may be regulated, whereas it would not be regulated if located above the first three storeys of a multi-storey building. We note Victorian decisions in which premises used as a cold-storage facility and a sand quarry were found to fall within the legislation.[7] These examples illustrate the uncertainty that can arise at the outer limits of broad statutory definitions and the possibility that the legislation may apply beyond conventional retail settings.

34. The evolution of the coverage rules for retail tenancy legislation has arguably departed from the original focus on addressing unequal bargaining power between retail landlords and tenants. The resulting uncertainty and unpredictability may discourage investment by both landlords and tenants.

35. Clearer and more consistent criteria for determining coverage would reduce uncertainty for landlords, tenants and their advisers, particularly those operating across multiple jurisdictions.

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5 *Retail Leases Act 2003* (VIC), s 52.
6 *Retail Leases Act 1994* (NSW), s 5(a).
7 *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2017] VSC 23; *Phillips v Abel* [2019] VCAT 1031.

5. Should any elements of scope and coverage be standardised in a national baseline? If yes, which elements should be consistent, which should remain flexible, and what costs and benefits would be expected?

36. The Law Council considers that any national baseline should include greater consistency in the core concepts used to determine the scope and coverage of retail tenancy legislation. An appropriate starting point would be a consistent definition of a retail tenant or retail premises, together with consistent treatment of relevant exemptions. Any national approach should be founded on clear principles identifying the classes of tenant that require legislative protection, having regard to the protective purpose of retail tenancy legislation.

37. Other matters that could usefully be aligned include the definition of a retail shopping centre and the circumstances in which a shopping-centre-based coverage trigger applies; the treatment of premises used for mixed or ancillary purposes; and appropriate exclusions for government, listed-entity, multinational or large retail chains and other tenants that may not require the protections intended for small retail businesses.

38. Where coverage depends on a floor-area, rent or occupancy-cost threshold, the Law Council considers that jurisdictions should, as far as practicable, adopt consistent metrics, including a consistent approach to the components included in any financial threshold. A national baseline should also specify when coverage is assessed and the limited circumstances in which it is reassessed. Reassessment should occur only at defined events, such as a renewal that creates a new lease or a material and approved change of use. Changes to relevant thresholds should operate prospectively and should not alter the regulatory status of an existing lease.

39. Agreement on uniform coverage rules may be difficult to achieve. Tenants currently protected under a particular jurisdiction's legislation may oppose reforms that would remove that protection, while landlords may oppose an expansion of coverage to tenants that are not presently regulated. Any proposal to standardise scope and coverage should therefore be developed through careful consultation and supported by transitional arrangements that preserve the status of existing leases and avoid retrospectively altering accrued rights and liabilities.

Pre-lease disclosure and information requirements questions

6. Which differences in disclosure requirements, including timing, content, provision of the draft lease, remedies and remedies for defective disclosure, most affect decision-making, transaction timeframes or dispute incidence, and what practical impacts do they have? Please provide indicative evidence on:
a. transaction delays (for example, days or weeks)
b. legal or advisory costs
c. frequency of disputes or renegotiation.

40. Pre-lease disclosure requirements differ between jurisdictions in relation to their timing, content and form, and the consequences of late, omitted or inaccurate disclosure. Disclosure statements should enable prospective tenants to readily identify and understand the essential terms of a proposed lease. However, some disclosure requirements have become overly complex. In Victoria, for example, four separate disclosure statements apply to non-shopping centre premises, shopping-centre premises, lease renewals and assignments involving an ongoing business. The information required may include the lease term and any options, rent and outgoings, fit-out requirements, relocation and demolition provisions, and additional information relating to shopping-centre leases.

41. The volume and complexity of the information required, particularly in relation to outgoings, may make disclosure statements difficult to understand. Differences between the terms recorded in a disclosure statement and those contained in the lease may also cause uncertainty and disputes. This was illustrated in the matter of *Pizza Trevi Pty Ltd v Cromwell BT Pty Ltd* [2017] NSWSC 794, where the lease and disclosure statement specified different dates for exercising an option to renew. Although the Court held that the lease prevailed, the case illustrates the adverse consequences that may arise where the two documents are inconsistent.

42. Disclosure timeframes also differ between jurisdictions. In Victoria, a landlord must provide a disclosure statement at least 14 days before the lease is entered into. If the statement is provided later, the lease term is taken to commence 14 days after it is given.[8] Some other jurisdictions prescribe a shorter period. In New South Wales and Queensland, for example, disclosure must generally be provided at least seven days before the lease is entered into.[9] We understand that the Victorian approach may cause the statutory commencement date to differ from the date stated in the lease, affecting anniversary-based rent reviews, timeframes for exercising rights or performing obligations, and the lease expiry date. Its interaction with minimum-term requirements may add further complexity to the calculation and administration of relevant dates.

43. Strict compliance with pre-lease disclosure timeframes may also be impractical—for example, where a tenant has been permitted to take possession before lawyers are instructed. In those circumstances, the disclosure requirements may create compliance risks and expose the landlord to penalties or termination rights, even where the tenant has already received the relevant commercial information and wishes to proceed.

44. The consequences of late, omitted or inaccurate disclosure also differ across jurisdictions and may include termination, compensation and penalties. These differences may create uncertainty about the consequences of non-compliance and expose parties to remedies that do not reflect the materiality of the defect or any prejudice suffered.

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8 *Retail Leases Act 2003* (Vic), s 17(1C).
9 *Retail Leases Act 1994* (NSW), s 11(1); *Retail Shop Leases Act 1994* (Qld), s 21B(1).

7. Would a nationally consistent disclosure baseline improve outcomes? If yes:
a. what minimum elements should be standardised?
b. the expected impact on costs, decision quality and disputes.

45. The Law Council considers that a nationally consistent disclosure baseline could improve outcomes by simplifying disclosure requirements and reducing unnecessary differences between jurisdictions.

46. A national baseline should include a single, simplified disclosure statement based on nationally consistent requirements. Matters that could usefully be standardised include: which parties must provide disclosure; the core information to be disclosed; the prescribed form; and any supporting documentation and execution requirements. We understand that while all jurisdictions require disclosure by landlords, only some require disclosure by tenants.

47. A national baseline should also require a draft lease to be made available sufficiently early to enable the prospective tenant to consider its terms alongside the disclosure statement. Feedback to the Law Council has suggested that a draft lease should be available before negotiations commence.

48. Further, a consistent timeframe for providing disclosure, together with an appropriate waiver mechanism, could allow an informed tenant to proceed sooner where they have received independent legal advice. A national baseline could provide for disclosure to be given at least seven days before the lease is entered into, together with a nationally consistent waiver should be available where the tenant has received independent legal advice and wishes to proceed within a shorter period.

49. Finally, the remedies available for late, omitted or inaccurate disclosure should be consistent and proportionate to the nature and effect of the non-compliance. Termination or compensation should generally depend on the materiality of the defect and any actual prejudice suffered, subject to appropriate treatment of deliberate non-disclosure or misleading conduct. A consistent period within which remedies for missing or defective disclosure may be exercised would also provide greater certainty.

50. A nationally consistent baseline should not, however, be assumed necessarily to reduce disputes. We note that previous efforts to harmonise disclosure statements have been only partially effective, and that retail leasing disputes may arise from a wide range of matters, including the nature and condition of the premises, the interpretation of lease terms, and representations made by the parties or their agents before the lease is entered into. Standardising disclosure requirements would not address all of these sources of dispute.

Lease terms and conditions questions

8. Which differences in lease terms (including minimum lease-term protections, relocation or demolition clauses, and renewal rules) most affect investment decisions or exit outcomes? Please provide evidence or examples of practical impacts, including:
a. tenant investment and certainty
b. exposure to rent increases or reviews over the lease term
c. process or advisory costs
d. relocation, demolition or early termination impacts
e. whether minimum lease-term protections improve outcomes compared with a no minimum-term approach.

51. Minimum lease-term protections, relocation and demolition rights, and renewal processes are areas where differences between jurisdictions may affect tenant investment, flexibility and exit outcomes.

52. Minimum lease-term protections are intended to provide tenants with security of tenure and sufficient time to recover their investment in the premises. However, a mandatory minimum term may also limit flexibility where the parties prefer a shorter commercial arrangement. We note that New South Wales removed its mandatory minimum five-year term from 1 July 2017,[10] and feedback from our members in that jurisdiction is not supportive of the reintroduction of that requirement.

53. The Law Council considers that tenants should have sufficient information to make an informed decision about whether to exercise an option to renew. Where the rent for an option term is to be determined by a market review, it may be beneficial for the tenant to be notified of the proposed market rent before the period for exercising the option expires. In this regard we note examples of the early market-rent determination processes in section 32 of the *Retail Leases Act 1994* (NSW) and section 28A of the *Retail Leases Act 2003* (Vic), under which a tenant may request an early determination of the market rent.

54. Relocation and demolition rights are another area in which differences between jurisdictions create complexity. Inconsistent statutory requirements may complicate the exercise of those rights where a landlord seeks flexibility to undertake development.

9. What minimum standards (if any) should be included in a national baseline? Please indicate expected impacts on costs, investment, flexibility and dispute incidence.

55. Feedback to the Law Council identifies relocation and demolition rights and renewal processes as areas in which national minimum standards may be beneficial.

[10] This amendment was made by the *Retail Leases Amendment (Review) Act 2017* (NSW).

56. In relation to relocation and demolition, a national baseline could prescribe minimum notice periods and the content of relocation and demolition notices; establish requirements for alternative premises offered to tenants; identify the categories of relocation or demolition costs for which compensation is available; and clarify the circumstances in which a development proposal is sufficiently genuine to enliven a landlord's relocation or demolition right.

57. A national baseline could also include a renewal process that facilitates the provision of the proposed market rent for an upcoming option term to the tenant before the period for exercising the option expires. This would enable the tenant to consider the proposed rent before deciding whether to exercise the option.

Rent and rent review questions

10. Which differences in rent and rent review settings (including permitted mechanisms, market rent processes, clauses preventing rent from decreasing, turnover rent and turnover arrangements) most commonly drive disputes or uncertainty, and what practical impacts do they have? Please provide indicative evidence on:
a. dispute frequency
b. variation in rent outcomes or predictability
c. compliance or advisory costs

58. Feedback to the Law Council has identified differences in permitted rent review methods, restrictions on particular review mechanisms, the frequency of rent reviews and valuation processes as areas that may create uncertainty or complexity. In particular, rent review mechanisms are a core component of retail leases and a frequent source of disputes. Differences between jurisdictions prevent landlords operating nationally from adopting a single rent review methodology or process.

59. In Victoria alone, there are five prescribed methods of calculating a rent review for a retail lease.[11] The application of different methods across jurisdictions can create confusion for landlords and tenants operating in more than one jurisdiction and may produce different rent outcomes.

11. Would greater consistency in rent and rent review settings improve outcomes? If yes, what minimum approach should apply and what impacts would be expected?

60. There is general support for greater national consistency in rent review settings, however feedback has noted that it is difficult to determine whether improved consistency would necessarily improve outcomes.

61. Any national baseline could address the methods of rent review that may be used, including whether more than one method may apply at a particular review date; adopt a consistent position on ratchet clauses and rent caps; and limit market rent reviews

[11] *Retail Leases Act 2003* (Vic), s 35(2).

to once in each 12-month period. Consideration should also be given to nationally consistent definitions of current market rent and turnover rent, valuation principles concerning matters to be taken into account, and processes for the appointment of valuers and the making of determinations.

Shopping centre questions

12. Which shopping centre-specific settings (including marketing funds, centre-level charges, turnover information requirements, trading-hours mechanisms or casual mall licensing) most commonly create issues in practice, and what practical impacts do they have? Please indicate impacts on:
a. transparency
b. tenant decision-making
c. dispute incidence
d. administrative burden.

62. Particular requirements within shopping-centre specific settings frequently give rise to issues in practice, emphasising the importance of a sufficiently detailed and accurate disclosure statement in establishing a tenant's expectations about the proposed lease. Minimum trading hours is one area that can cause issues, as is the provision of turnover information, particularly where there is ambiguity about what constitutes turnover under the lease.

63. Relocation and redevelopment may also give rise to practical issues, in particular, issues concerning the suitability of premises to which a tenant is relocated and disturbance during periods of redevelopment.

64. We also note the separate issue concerning the application of retail tenancy protections to large retailers operating within shopping centres. Feedback to the Law Council has suggested that a national review should give consideration to distinguishing between small businesses requiring statutory protection and large, financially powerful retailers. This is particularly relevant in the context of smaller shopping centres, where the inclusion of large retailers within the statutory regime may affect the balance of bargaining and negotiating power between landlords and tenants.

13. Would minimum standards, a voluntary industry code or statutory requirements improve transparency and reduce disputes in shopping centre-specific matters? Please provide examples and reasons, including implications for consistency, enforceability, flexibility and dispute outcomes.

65. Feedback to the Law Council is broadly supportive of statutory disclosure requirements for shopping centre leases as a means of improving transparency and potentially reducing disputes. A clear statutory disclosure framework promotes consistency and compliance by attaching consequences to inaccurate or incomplete disclosure.

66. In this regard we note the approach under the *Retail Leases Act 1994* (NSW), where statutory consequences attach to inadequate or incomplete disclosure. In particular, a tenant may, in certain circumstances, terminate the lease where a disclosure statement was not provided, was incomplete or contained materially false or misleading information. A tenant is also not liable to pay an outgoing unless the liability to pay that outgoing was disclosed in the lessor's disclosure statement.[12]

Outgoings and operating expenses questions

14. Which outgoings categories, disclosure practices or verification requirements most often create uncertainty or disputes, and what practical impacts do these differences have? Please provide indicative evidence on:
a. cost impacts
b. frequency of disputes
c. administrative burden
d. comparability of occupancy costs.

67. Feedback to the Law Council has identified jurisdictional differences with the categories of outgoings that landlords may or may not recover from tenants, as well as the requirements governing the disclosure, verification and administration of outgoings. Differences in non-recoverable categories, audit requirements, timing obligations and adjustment mechanisms create administrative complexity for landlords and tenants managing portfolios across multiple jurisdictions.

68. Land tax provides one example of these differing approaches. For example, in New South Wales, section 26 of the *Retail Leases Act 1994* (NSW) limits the amount of land tax that may be recovered from a tenant to the amount the landlord would have paid if the land were owned as a single holding without concessions. By contrast, section 50 of the *Retail Leases Act 2003* (Vic) prohibits a landlord from recovering land tax from a tenant under a retail premises lease. Differences of this kind may create concerns for parties unfamiliar with the requirements of the relevant jurisdiction.

69. The recovery of fire safety costs, including annual certification costs, is a further area in which disputes may arise where the lease is unclear about the extent to which those costs may be recovered by the landlord.

15. Would greater consistency in outgoings disclosure and reporting materially improve comparability and reduce disputes? If yes, what minimum approach is workable?

70. Greater consistency in the disclosure and administration of outgoings could improve comparability and reduce administrative complexity, particularly for landlords and tenants operating across multiple jurisdictions. Consistency could assist tenants to compare premises in different jurisdictions and improve efficiencies for landlords and their advisers operating across multiple jurisdictions.

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[12] *Retail Leases Act 1994* (NSW), ss 11(2) and 12A(1).

71. A national baseline could establish a consistent core list of categories of outgoings that may not be recovered from tenants; standard timing requirements for the provision of outgoings estimates and statements; nationally consistent minimum audit or verification requirements; and consistent timeframes for adjustments.

72. Greater consistency should not, however, be assumed necessarily to reduce disputes, noting that this would depend on the content of the harmonised requirements. We observe that disputes are more likely to arise from poor or defective disclosure.

73. Finally, we note difficulties that may arise where landlords seek to recover outgoings that were not originally identified in the disclosure statement, including newly arising or previously unanticipated costs—for example, congestion levies, audit fees and maintenance costs. A lease may permit the relevant outgoings to be passed on to the tenant while the disclosure statement does not identify it, which can give rise to disputes when the tenant is subsequently asked to pay the amount.

Fit-out, incentives and make-good questions

16. Which aspects of fit-out, incentives and make-good obligations most commonly lead to uncertainty or disputes, and what practical impacts do these issues have, particularly at the end of the lease? Please provide examples and indicative costs where possible.

74. Disputes concerning fit-out, incentives and make-good obligations may arise where the parties' respective obligations are not clearly documented, including where relevant arrangements are recorded in documents separate from the lease, such as a side deed or agreement for lease. Clear documentation of these matters at the commencement of the lease will assist in reducing uncertainty as to respective obligations.

75. Particular issues identified in feedback include disputes concerning a landlord's entitlement to recover, or "claw back", an incentive or fit-out costs where a lease is terminated. In relation to make-good obligations, disputes may arise where the condition of the premises at the commencement of the lease has not been adequately documented.

76. A further issue concerns the interaction between make-good obligations and the application of retail tenancy legislation. In make-good disputes, a tenant may contend that the premises are retail premises to which retail tenancy legislation applies, with the consequence that the landlord is responsible for maintaining the premises in the condition required by the legislation, notwithstanding the parties' arrangements at the commencement of the lease. We note that this issue would largely be addressed by a more consistent and accurate definition of "retail premises".

17. Would minimum disclosure requirements or limited standardised rules reduce disputes? If yes, what elements should be standardised?

77. Feedback to the Law Council suggests that standardisation of fit-out, incentive and make-good obligations may be of limited assistance because disputes in these areas are often specific to the premises and the parties' arrangements. Nevertheless, there may be some merit in a standard requirement for a condition report to be prepared before the tenant takes occupation of the premises.

78. Such a requirement would provide a contemporaneous record of the condition of the premises at the commencement of the lease, and could, for example, assist in determining the parties' respective make-good obligations at the end of the lease.

Assignment, sub-letting and changes of control questions

18. Which differences in assignment processes (including consent timeframes, conditions and liability release) most commonly delay or disrupt business transactions, and what are the practical impacts of these differences? Please provide indicative evidence on:
a. delays (for example, transaction time)
b. legal or advisory costs
c. impact on business saleability
d. residual liability for outgoing tenants or guarantors.

79. There are noteworthy differences between jurisdictions in the requirements governing assignment of retail leases, including the grounds on which a landlord may withhold consent, applicable consent timeframes and the extent to which an outgoing tenant or guarantor is released from liability following an assignment.

80. The treatment of an outgoing tenant and any guarantor following assignment is identified as a particularly significant area of divergence. In New South Wales, section 41A of the *Retail Leases Act 1994* (NSW) provides, in the case of an assignment in connection with the continued use of the shop for the conduct of an ongoing business, for the release of the assignor and any guarantor or covenantor from liability for amounts payable under the lease after assignment, subject to compliance with the prescribed disclosure requirements. Different approaches to continuing liability may therefore affect the residual risk borne by an outgoing tenant and guarantor following the sale of a business.

81. Other differences concern the requirements applying to a proposed assignee, including matters such as retailing skills and financial resources, business records and the types of security provided under the lease. Differences in consent timeframes and grounds for refusing consent may add further complexity to the assignment process.

82. These differences are of particular practical significance where a business operates across multiple jurisdictions, as different assignment processes can make the sale of a business involving multiple retail leases more difficult and costly, while creating transactional uncertainty in portfolio transactions and franchise rollouts.

19. What elements of assignment, sub-letting or change-of-control processes (if any) should be standardised to improve predictability and reduce costs?

83. The Law Council is supportive of steps towards greater consistency in key elements of the assignment process. In particular, a national baseline could establish consistent grounds on which a landlord may refuse consent to an assignment and a uniform approach to the release of an outgoing tenant and any guarantor following assignment.

84. There is also support for a nationally consistent prescribed application form, minimum assignment disclosure requirements, and a consistent 28-day period for landlords to respond to requests for consent, with deemed consent where no response is provided within that period. Harmonising the grounds for refusing consent would also assist parties undertaking a multi-jurisdictional sale of business.[13]

85. In our view, greater consistency in these areas could improve predictability in assignments involving multiple retail leases.

Dispute resolution questions

20. Which differences in dispute resolution pathways, including mediation gateways, institutional models, tribunal or court processes and post-mediation pathways, most affect cost, speed and accessibility? Would greater consistency improve outcomes? Please provide evidence on:
a. dispute volumes
b. common causes of disputes
c. timeframes and outcomes
d. whether data is administrative, survey-based or anecdotal
e. the design features that would be most important in any consistent pathway.

86. Dispute resolution pathways need to provide timely, accessible and proportionate mechanisms for resolving retail leasing disputes. Feedback to the Law Council reports different dispute resolution processes between jurisdictions, while noting that greater consistency in dispute resolution pathways should not be assumed necessarily to improve outcomes. In this regard, greater harmonisation of dispute resolution pathways may not produce better outcomes or reduce disputes, as the design and operation of dispute resolution pathways depend on jurisdiction specific considerations, including existing infrastructure, resourcing and jurisdictional arrangements.

87. In New South Wales, retail lease disputes are generally subject to compulsory mediation before proceedings may be commenced in the NSW Civil and Administrative Tribunal, subject to limited exceptions. There is support in feedback to

[13] As referred to in Table A9.1 of the Consultation Paper, there is variance in the prescribed grounds for refusing consent as well as some jurisdictions adopting a less prescriptive approach.

the Law Council for retaining a pathway involving alternative dispute resolution followed, where necessary, by recourse to an administrative tribunal.

88. By contrast, we are aware of delays in the resolution of retail leasing disputes in Victoria. Retail lease disputes must first be referred to the VSBC before they may proceed to the VCAT.[14] As a result of delays in the appointment of a mediator and further delays in obtaining a hearing, parties potentially wait up to two years for resolution.

89. To address these delays, it is suggested that parties be permitted to pursue alternative dispute resolution outside the VSBC process, including private mediation or arbitration. Where that process is unsuccessful, the VSBC should be able to certify that alternative dispute resolution has been attempted before the matter proceeds to VCAT.

90. Rather than seeking complete uniformity in institutional arrangements for dispute resolution, any national approach could focus on ensuring access to effective alternative processes and an appropriate pathway for unresolved matters to proceed to a tribunal or court, while allowing jurisdictions to accommodate their existing institutional and resourcing arrangements.

Prohibited conduct and enforcement questions

21. Where do retail-leasing-specific provisions and Australian Consumer Law protections overlap or create ambiguity in practice? What impacts does this have, and what design features would improve clarity while maintaining protections? Please indicate impacts on:
a. cost
b. delay
c. duplication of processes or forums
d. pathway or remedy uncertainty.

91. Retail leasing legislation may overlap with protections available under the Australian Consumer Law within the *Competition and Consumer Act 2010* (Cth), including in relation to unconscionable conduct and misleading or deceptive conduct. For example, Part 7A of the *Retail Leases Act 1994* (NSW) addresses these forms of conduct notwithstanding the protections available under Australian Consumer Law. Feedback has suggested that some landlords use particularly aggressive, landlord-friendly lease terms that may encroach on rights available under the Australian Consumer Law.

92. Views expressed to the Law Council diverge on whether the overlap between retail-leasing-specific provisions and the Australian Consumer Law creates undue uncertainty or ambiguity in practice. Generally speaking, there is recognition that the retail-leasing-specific provisions play an important role in applying the relevant protections in the retail leasing context and does not support removing those

[14] Business Victoria, Retail lease and commercial disputes (Website, last updated 5 Dec 2023).

provisions merely because equivalent or overlapping protections are available under the Australian Consumer Law.

22. What design features would improve clarity while maintaining protections?

93. A national minimum baseline could assist in addressing concerns about lease terms that may encroach on rights available under the Australian Consumer Law.

Harmonisation options and approaches questions

Model choice

23. Which harmonisation model is most workable in practice (single national law, model law or national minimum baseline), and why?

94. Feedback to the Law Council generally supports pursuing greater national consistency through either a single national law or a model law supported by a national minimum baseline, noting there are divergent views on this question.

95. There is considerable support for a model law based on a national minimum baseline, noting that this approach would provide consistency while preserving some jurisdictional flexibility. This approach is likely to be the most workable, having regard to the need to reach agreement among the States and Territories, each of which already has an established legislative framework. Under a model law and national minimum baseline approach, the national framework should be supported by prescribed forms, a common dictionary of core terms and uniform timing rules.

96. Some input to the Law Council has expressed support for a single Commonwealth law applying nationally and replacing State and Territory retail tenancy legislation. This view, however, acknowledges the difficulties associated with this approach,[15] and notes that if a single national law is not achievable a model law with national minimum baselines may be a more practical approach.

97. In 2013–14, the Law Council commissioned a project that sought to develop a draft Uniform Torrens Title Act for adoption across all States and Territories. Treasury, in consultation with State and Territory governments, may wish to consider a similar approach to developing model retail tenancy legislation. Any work towards a model commercial lease capable of adoption across all States and Territories would also need to address differences in the underlying Torrens title legislation. The Law Council would welcome the opportunity to discuss its experience of that earlier work with Treasury.

[15] As noted on page 21 of the Discussion Paper, this may involve referral of powers or other constitutional mechanisms and would likely require transition from existing state and territory frameworks, including replacement or integration of current legislation.

Impact of preferred model

24. What are the estimated transition impacts, ongoing impacts and distributional impacts of your preferred model?

98. The transition impacts of any harmonised framework will depend on the nature of the substantive reforms and how they are implemented. Changes are likely to require updates to lease documentation and leasing processes, together with associated education and training for landlords, tenants, legal practitioners, real estate agents and other industry participants.

99. Those impacts may be greater if reforms are implemented in multiple stages. Each tranche of reform may require further changes to documentation and processes and additional education and training, rather than confining those transition costs to a single implementation period. The extent of any ongoing compliance costs is difficult to assess without knowing the substantive requirements that would form part of a national framework.

100. The distributional impacts of harmonisation are likely to be significant. Landlords and tenants would incur costs associated with obtaining advice and adapting to new requirements, while legal practitioners and real estate agents would also need to become familiar with the new framework.

101. The benefits are likely to be greatest for landlords and tenants operating across multiple jurisdictions, who may benefit from greater consistency in requirements and processes. By contrast, parties operating solely within one jurisdiction may incur transition and compliance costs without obtaining the same benefits from national consistency. The feedback therefore emphasises the importance of ensuring that harmonisation delivers substantive improvements, rather than imposing changes solely for the purpose of achieving uniformity.

Prioritisation and sequencing

25. Which areas should be prioritised for alignment (top three), and why? What sequencing or staging approach would minimise disruption while delivering early benefits?

102. Feedback to the Law Council identifies legislative scope and coverage, and disclosure requirements, as priority areas for greater national consistency. In relation to scope and coverage, greater consistency in determining what constitutes a retail premises or retail lease could reduce uncertainty about the application of retail tenancy legislation. Greater consistency in documentation and disclosure requirements could similarly reduce the need for jurisdiction-specific processes and documentation.

103. Two other areas for priority include greater consistency in waiver and breach requirements, and prohibitions relating to rent review ratchet clauses.

104. In relation to sequencing, any harmonised reforms should apply only to new leases entered into after the reforms commence, rather than renewed or varied leases. We also note the desire to minimise the number of implementation tranches, noting that each tranche would require updates to precedent leases and disclosure statements, legislative review and further adjustment by industry participants. A more consolidated implementation approach would reduce the potential for confusion associated with piecemeal changes and allow the relevant retail leasing legislation to be reviewed more holistically.

Governance and durability

26. What governance arrangements would best maintain alignment over time?

105. Maintaining alignment over time will require governance arrangements capable of limiting divergence between jurisdictions as their respective retail tenancy frameworks evolve.

106. A single national legislative approach would provide the strongest means of maintaining alignment, noting the potential for separate State and Territory legislation to be amended over time. Maintaining alignment would require a properly resourced, long-term intergovernmental arrangement.

Risks and unintended consequences

27. What are the main risks of greater consistency or harmonisation (for example, reduced flexibility, increased costs or impacts on investment), and what safeguards or design features would mitigate these risks?

107. There are a number of risks associated with greater consistency or harmonisation. These include reduced flexibility to accommodate local retail market features and established practices; difficulties arising from differences in underlying State and Territory property law and leasing practices, including the Torrens title legislation discussed above; and the risk that any initial alignment may erode over time if individual jurisdictions subsequently depart from the agreed framework.

108. The benefits and burdens of harmonisation may also be unevenly distributed. The benefits are likely to accrue principally to landlords and tenants operating across multiple jurisdictions, while parties in jurisdictions that currently impose less onerous requirements may face increased compliance burdens under a harmonised framework.

109. These risks reinforce the importance of ensuring that any harmonised framework delivers substantive improvements and is capable of maintaining alignment over time.

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The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.