

Our reference: QSBC-5691

21 October 2022

Property Law Act Review
Strategic Policy and Legal Services
Department of Justice and Attorney-General
via email: [REDACTED]

Re: Property Law Act Review – Property Law Bill consultation

It is my aim as Queensland Small Business Commissioner, together with my supporting office (collectively referred to as the QSBC), to enhance the operating environment for small businesses through practical information, fast and fair assistance, and collaborative advocacy.

The QSBC welcomes the opportunity to provide feedback on the public exposure draft of the Property Law Bill 2022 (the Bill), as part of the Property Law Act Review. The QSBC supports the need for contemporary property law – with a simple lease framework that reflects current commercial practice, repeals outdated provisions and uses plain language. We acknowledge the commitment from the Queensland Government’s Department of Justice and Attorney-General to modernise Queensland’s property law, and the work completed to-date by the Commercial and Property Law Research Centre of the Queensland University of Technology (QUT).

Under the *Small Business Commissioner Act 2022*, the QSBC provides a voluntary alternative dispute resolution service and low-cost mediation process for eligible small business lease disputes, and administers a low-cost mediation process for retail tenancy disputes under the *Retail Shop Leases Act 1994* (RSL Act) – both of these Acts are underpinned by the property law framework. During 2021–22, the QSBC assisted small businesses, commercial lessors, and other small business stakeholders on more than 2,700 occasions¹. This included closing 251 leasing disputes, 138 of which received low-cost mediation².

There are approximately 450,000 small businesses in Queensland who represent more than 97% of Queensland businesses³. Many small businesses are a party to a commercial lease and are therefore subject to Queensland’s property law. It is important to note the power imbalance that often exists between small business lessees and their lessors - with most small businesses not possessing the experience or capabilities of larger businesses, or the resources to engage specialist support. Small businesses seeking access to justice via the Queensland Civil and Administrative Tribunal (QCAT) or a court are also at a disadvantage, with many being unable to afford the lost time and cost of these lengthy and complex processes.

¹ Queensland Small Business Commissioner Annual Report 2021–22 (page 4). Queensland Small Business Commissioner, Brisbane.

² Queensland Small Business Commissioner Annual Report 2021–22 (page 4). Queensland Small Business Commissioner, Brisbane.

³ ABS 8165 Counts of Australian Business, including entries and exits as of 30 June 2020. Australian Bureau of Statistics, Canberra.

As such, we recommend that the final version of the Bill strongly considers the needs of small businesses, their capabilities, and their vulnerabilities. In relation to the draft Bill, the QSBC provides the following feedback:

PART 9 – LEASES

ADDITIONAL PROVISIONS FOR PART 9 – LEASES

The QSBC recommends that further provisions be added to 'Part 9 Leases' to underpin the framework for better commercial relationships between lessees and lessors, including:

Cooling-off period

In the QSBC's experience, many small business lessees do not allow themselves enough time to think through an offer or to seek legal advice before signing a lease agreement, and may feel pressured into signing leases during lease negotiations. A simple cooling-off period would provide small businesses with a means to withdraw from the lease should this occur, saving time and costs for both parties.

The QSBC recommends that:

- a clause be added to the Bill which provides a cooling-off period (e.g., five business days) for a new lease agreement, especially if the lessee is a small business.
- the clause could stipulate that if a lessee opts to withdraw from the agreement during the cooling-off period, they are liable for reasonable expenses incurred by the lessor, such as legal expenses to draw up the contract, advertising fees etc., which could deter any frivolous actions.

Alternative dispute resolution services and good faith

In 2021–22, the QSBC resolved 64% of leasing disputes via informal resolution or mediation, with an average processing time of 51 days⁴ (for 2022–23, it currently sits at 82% resolved and 29 days processing time⁵). This vital service saves small business lessees and their lessors (many of whom are also small businesses) from lengthy and costly court processes, ultimately increasing productivity and giving small businesses fast, fair and affordable access to justice.

While parties to a retail tenancy dispute under the RSL Act *must* attempt mediation via the QSBC prior to progressing to a tribunal or the court, it is *voluntary* for parties to a non-retail tenancy dispute about a lease under the current *Property Law Act 1974* (current PLA) as provided for in the SBC Act. In the QSBC's experience, as mediation via the QSBC is currently voluntary for parties to a non-retail tenancy dispute, many lessors refuse to participate in mediation, leaving small business lessees with no other choice but to apply to the court or to drop the matter entirely at significant cost to both the businesses involved and the community.

The QSBC recommends that:

- a clause be added to the Bill stipulating that parties should participate in an appropriate alternative dispute resolution (ADR) process to resolve a dispute prior to applying to a court. If the matter is unable to be resolved via ADR, a party to the lease could then apply to have the matter heard before a court with relevant jurisdiction.
- a clause be added requiring parties to a dispute to cooperate and act reasonably and in good faith in all discussions and actions associated with the dispute (see the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020). There are ample common law arguments supporting good faith and a clause allowing the parties behaviour during the lease and related activities to be considered by a court in any future proceedings about the lease.

⁴ Queensland Small Business Commissioner Annual Report 2021–22 (page 4). Queensland Small Business Commissioner, Brisbane.

⁵ Queensland Small Business Commissioner reporting dashboard (1 July 2022 – 20 October 2022).



DIVISION 2 GENERAL RULES

s 126 Implied terms

The QSBC endorses the addition of standard lease terms to commercial tenancy agreements, as this provides small business lessees and their lessors with a good framework for their lease agreement. Aside from those leases that require a more complex arrangement, many small businesses and their landlords have enquired of the QSBC seeking a standard lease provided by the government for simple leases - with consistent and easy to understand requirements that are clearly articulated in the legislation to improve consistency (similar to the 'General tenancy agreement (Form 18a)' under the *Residential Tenancies and Rooming Accommodation Act 2008*).

Specific feedback on the proposed standard lease terms is provided below at 'Schedule 1 Implied terms section 126'.

DIVISION 4 DEALINGS WITH LEASES

s 129 Effect of requirement in lease for consent of lessor to assign lease or take other action

As per the supporting argument for the addition of an alternative dispute resolution services and good faith provisions (page 2), the QSBC recommends that:

- a subsection be added to s 129 stipulating that parties should participate in an appropriate ADR process to resolve the matter, prior to applying to the court. If the matter is unable to be resolved via ADR, the lessee could then apply to have the matter heard before a court with appropriate jurisdiction.

s 131 Effect of assignment of lease by transferee to subsequent transferee

The RSL Act contains provisions (s 50A(1)) which immediately relieve an assignor (and any guarantors) of liability upon assignment of the lease. QUT's 'Final report: *Property Law Act 1974*' argues that parties to non-retail leases do not require these same protections as,

*"These parties are likely to be more sophisticated and able to protect their own interests in a commercial leasing environment. For this reason, the Centre's recommendations do not go as far as the measures in the retail shop leasing legislation."*⁶

In the QSBC's experience, there is no difference between the lessee of a retail shop lease and that of a non-retail shop lease, where the lessee is a small business. Many small businesses, irrespective of the type of lease, do not seek legal advice before signing a commercial lease, and there is a frequent power imbalance between a small business lessee and their lessor, which can lead to disputes. In fact, 40%⁷ of leasing disputes lodged with the QSBC pertain to non-retail shop leases. Arguably, this figure would be even higher if access to ADR for non-retail lease disputes through the QSBC was mandatory instead of the current voluntary process - suggesting that non-retail shop lessees are no more likely to be able to protect their interests than retail shop lessees are.

Therefore, a non-retail shop lessee should be provided with the same protections as a retail shop lessee in regards to relieving an assignor (and any guarantors) of liability upon assignment of the lease. Removing this unnecessary liability for the original lessee, where the parties have agreed, would simplify the leasing environment and make the relevant parties responsible.

The QSBC recommends that:

- s 131 be expanded to relieve the original lessee (and any guarantor) from liability upon assignment of the lease to an assignee (as per s 50A(1) of the RSL Act), not just when it is assigned to a subsequent assignee.

⁶ Final report: *Property Law Act 1974* (page 687). Commercial and Property Law Research Centre, Queensland University of Technology, Brisbane.

⁷ Queensland Small Business Commissioner reporting dashboard – 'Requests for dispute assistance' and 'Applications for mediation' relating to non-retail shop leases, lodged between 1 July 2022 – 20 October 2022.



s 130 Effect of assignment of lease by lessee to assignee

As per the supporting argument for s 131, it is the QSBC's experience that many small business lessees do not seek legal advice when signing or assigning a lease. If the liability for the original lessee of an assigned lease is not removed as per our recommendation regarding s 131, then it is imperative that this liability is clearly outlined in s 130 to help ensure lessees are aware of this continuing liability.

The QSBC recommends that:

- if liability for the original lessee of an assigned lease is not removed as per our recommendation regarding s 131, then; a subclause should be added to s 130 to make it clear that if a lessee assigns a lease to an assignee, that the original lessee remains liable for any breach by the assignee, unless otherwise agreed by the lessor when the lease is assigned.

DIVISION 5 RELIEF

s 139 Definitions for subdivision

If the liability for the original lessee of an assigned lease is not removed as per our recommendation regarding s 131, then it is imperative that the original lessee is kept informed of any breaches to the lease that they remain liable for. This will enable the original lessee to attempt to remedy any breaches of the lease and reduce their liability. The QSBC recommends that:

- if liability for the original lessee of an assigned lease is not removed as per our recommendation regarding s 131, then; the definition of a *designated person* under s 139 be amended to include the 'original lessee of an assigned lease'.

s 141 Lessor must give copy of notice to remedy breach to designated persons

As per the supporting argument for s 139, if the liability of a former lessee is retained in the Bill, an original lessee who remains liable for a lease must be recognised as a *designated person* under the lease. It is imperative that the original lessee is notified of any breaches to the lease that they remain liable for and be given the opportunity to remedy the breach and reduce their liability, prior to the lessor exercising their rights.

The QSBC recommends that:

- if liability for the original lessee of an assigned lease is not removed as per our recommendation regarding s 131, then s 141(2) should be amended to state that the 'original lessee of an assigned lease' *must* be notified by the lessor to allow them the opportunity to remedy the breach prior to the lessor exercising their rights.

s 147 Proceedings for relief against forfeiture

As per the supporting argument for s 129, the QSBC recommends that:

- a subsection be added to s 147 stipulating that parties should participate in an appropriate ADR process to resolve the matter, prior to applying to the court. If the matter is unable to be resolved via ADR, the lessee could then apply to the court for a decision.

s 152 Lessor must give copy of notice to designated persons

As per the supporting argument for s 141, the QSBC recommends that:

- if liability for the original lessee of an assigned lease is not removed as per our recommendation regarding s 131, then s 152(3) should be amended to state that the 'original lessee of an assigned lease' *must* be notified by the lessor to allow them the opportunity to remedy the breach prior to the lessor exercising their rights.

s 153 Proceedings for relief against refusal

As per the supporting argument for s 129, the QSBC recommends that:

- a subsection be added to s 153 stipulating that parties should participate in an appropriate ADR process to resolve the matter, prior to applying to the court. If the matter is unable to be



resolved via ADR, the lessee or designated person to the lease could then apply to have the matter heard before a court with appropriate jurisdiction.

GENERAL FEEDBACK ON PART 9

The QSBC recommends that:

- any reference to notice periods in 'days' throughout 'Part 9 Leases' be amended to 'business days' to avoid any confusion, for example s 129(6)(a) states "within 30 business days" while s 152 (3)(a) states "within 14 days".

SCHEDULE 1 IMPLIED TERMS SECTION 126

GENERAL FEEDBACK ON SCHEDULE 1

The QSBC recommends that:

- the name of Schedule 1 be amended to clarify its use e.g., "Standard terms to a lease" or "Mandatory minimum terms to a lease".
- where there is a related establishing provision within the Bill, the related clause in Schedule 1 should refer the reader to that specific section/s (not just the Part and/or Division). This will ensure that the parties using the standard lease terms in their lease agreement will better understand their rights and obligations under the Bill.

3 Maintain and leave the premises in good repair

Of the leasing disputes lodged with the QSBC, 32% relate to maintenance / repairs⁸. A further 19% relate to make good provisions / bond⁹, with many lessors not returning bond due to alleged damages and repairs not carried out, or premises not being sufficiently restored to their original state. In the QSBC's experience, these disputes are often the result of commercial leases which do not clearly stipulate who is liable for repairs, what *make good* means, and how bond will be managed; lessees and lessors not adequately documenting the condition of the premises on commencement of the lease; and disagreements over what is considered *reasonable* wear and tear.

The QSBC recommends that:

- a new clause be added (either as a subclause under clause 3, or its own standalone clause), requiring the lessor and lessee to complete a detailed entry condition report of the leased premises within 20 business days of the commencement of the lease, and that the entry report be signed by both parties and kept on record (these records should be transferred to new lessees/lessors in the event the lease is transferred/reassigned). This will assist the lessee to yield the leased premises in the original condition as required under subclause (1)(a). An entry report template could be developed by Queensland Government to assist parties in meeting this requirement.
- that a definition and/or examples of what is considered to be *reasonable wear and tear* under subclause (2)(a) be added to 'Schedule 1 Implied terms' and/or 'Schedule 2 Dictionary'.
- that a definition of *make good* be included in the standard terms of a lease to make it clear what *make good* means, unless the parties agree to an alternative arrangement in writing.
- a new clause be added (either as a subclause under term 3, or its own standalone clause), relating to the payment, management and return of bond. The clause should require that the bond be held in a manner that provides control for both parties and provides a clear record that the bond was paid and received (and transferred in the event that the lease is transferred

⁸ Queensland Small Business Commissioner reporting dashboard – 'Requests for dispute assistance' and 'Applications for mediation' relating to non-retail shop leases and maintenance/repairs, lodged between 1 July 2022 – 20 October 2022.

⁹ Queensland Small Business Commissioner reporting dashboard – 'Requests for dispute assistance' and 'Applications for mediation' relating to non-retail shop leases and bond/make good, lodged between 1 July 2022 – 20 October 2022.



to a new lessor). An example could also be provided to help further define e.g., “Example: providing a bank guarantee for an amount equivalent to one month’s rent” as bank guarantees are a good option to minimise confusion and provide independence from both parties.

4 Abatement of rent if premises is destroyed or damaged

In the QSBC’s experience, many disputes arise due to ambiguous terminology in legislation and commercial lease agreements. Following the South-East Queensland rainfall and flooding event in early 2022, the QSBC encountered scenarios such as a lessor believing a flooded premises was *fit for use* as the water had since receded and the lessee could technically still operate the business. The current Bill also does not address safety in relation to the premises which while implied in fitness could be specifically called out. Where possible, terms should be in plain language that a reasonable lay person can understand, be well-defined and/or include examples to assist in the reasonable interpretation of the term.

The QSBC recommends that:

- subclause (1) be amended to read “If the leased premises or any part of them are destroyed or damaged by a relevant cause to the extent that they become *unfit for the intended use by the lessee, or would reasonably be considered unsafe*, the rent and any contribution payable by the lessee...”. An example could also be provided to help further define e.g., “Example: unsafe as a workplace for which the *Work Health Safety Act 2011* (Qld) applies.”
- if the above recommendations are not adopted; a definition and an example of what is considered to be *unfit for occupation and use by the lessee* under subclause (1) be added to ‘Schedule 1 Implied terms’ and/or ‘Schedule 2 Dictionary’.

6 Noxious or offensive acts or things

As per, and in extension of, the supporting argument for clause 4, the QSBC recommends that:

- at a minimum, that ‘unreasonable’ be added to subclause (3)(b) e.g., “any act or thing that is, or is likely to be, a nuisance or that causes, or is likely to cause, any *unreasonable* nuisance, damage or disturbance”.
- examples of what is considered to be *any nuisance, damage or disturbance* under subclause (3)(b) should also be added to ‘Schedule 1 Implied terms’.

7 Commission of waste

As per the supporting argument for clause 4, the QSBC recommends that:

- the term *voluntary waste* is replaced with plain language to improve the readability and understanding of this clause e.g., “overt and wilful acts of destruction in relation to the leased premises” or, if not changed, a definition of *voluntary waste* be added to ‘Schedule 1 Implied terms’ and/or ‘Schedule 2 Dictionary’.

8 Lessee entitled to quiet enjoyment

As per the supporting argument for clause 4, the QSBC recommends that:

- a definition and/or examples of what is considered to be a *disturbance* under subclause (1) be added to ‘Schedule 1 Implied terms’ and/or ‘Schedule 2 Dictionary’.
- the word *derogate* under subclause (2) is replaced with plain language to improve the readability and understanding of this subclause e.g., “detract” or “reduce the ability to lease”.

9 Change of use

The QSBC recommends that:

- this clause be moved to sit near clause 5 ‘Assignment of lease’, as they relate to the same section of the Bill (s 129). This will improve the readability of Schedule 1.



10 Power to inspect premises

As per the supporting argument for clause 4, the QSBC recommends that:

- a notice period (of a minimum 2 business days, as required under the current PLA, s 107) be added to subclause (1)(a) for a lessor/agent to enter the leased premises for the purpose of inspecting the premises.
- a notice period (of a minimum 2 business days), be added to subclause (1)(b) for a lessor/agent to enter the leased premises for the purpose of carrying out repairs, unless the repairs are urgent. While there is no notice period provided under the current PLA for repairs, the QSBC believes the addition of this provision will reduce the likelihood of disputes arising between lessees and lessors related to access of the premises.
- if the above recommendations are not adopted; that a definition and/or examples of what is considered to be *all reasonable times* under subclause (1) and *not unreasonably interfere* under subclause (2) be added to 'Schedule 1 Implied terms' and/or 'Schedule 2 Dictionary'.
- this clause be moved to sit near clause 8 'Lessee entitled to quiet enjoyment', as they are related clauses. This will improve the readability of Schedule 1.

11 Power to terminate lease for non-payment of rent or other breach

The QSBC recommends that:

- subclause (3) be altered, or a new subclause added, to clarify that a notice to remedy breach for non-payment of rent or other type of breach must be issued to the lessee prior to the termination of the lease, as per s 140.

12 Lessee may remove lessee's fixtures

The QSBC recommends that:

- subclause (1) be amended to add "unless the lessee and lessor agree in writing for the fixtures to remain the lessee's fixtures should be removed". This will avoid arguments about make good e.g., where a lessee believes a fixture adds value and a lessor does not, or vice versa.
- this clause be moved to sit near clause 3 'Maintain and leave the premises in good repair', as they are related clauses. This will improve the readability of Schedule 1.

PART 2 GENERAL RULES AFFECTING PROPERTY

s 11 Nature of interest in land created by parol

As per the supporting argument for Schedule 1 clause 4, the QSBC recommends that:

- the word *parol* is replaced with plain language to improve the readability and understanding of this section e.g., 'not in writing' 'created verbally' or 'created orally' etc.

Thank you once again for the opportunity to provide feedback on the draft Bill. If you have any questions, please contact Rebekah Godbold, Principal Policy Officer on [REDACTED] or via email at [REDACTED].

Yours sincerely



Maree Adshead
Small Business Commissioner

