

COMMERCIAL TENANCY
(RETAIL SHOPS)
AGREEMENTS (No. 2).

No. 49 of 1985.

AN ACT to amend the Commercial Tenancy
(Retail Shops) Agreements Act 1985.

[Assented to 28 October 1985.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

1. (1) This Act may be cited as the *Commercial Tenancy (Retail Shops) Agreements Amendment Act (No. 2) 1985*. Short title and principal Act.

(2) In this Act the Commercial Tenancy (Retail Shops) Agreements Act 1985 is referred to as the principal Act. Act No. 43 of 1985.

No. 49.] *Commercial Tenancy (Retail Shops) Agreements (No. 2).* [1985.

Commence-
ment.

2. This Act shall be deemed to have come into operation on the day on which the principal Act came into operation.

Section 3
amended.

3. Section 3 of the principal Act is amended—

(a) in subsection (1), by inserting before the semicolon at the end of the definition of “lease” the following—

“ but does not include a licence or agreement relating to the common area of a retail shopping centre by reason only that it provides for a person to use a portion of the common area the continued use of which as a portion of the common area is not intended to be otherwise precluded ”; and

(b) by inserting after subsection (3) the following subsection—

“ (4) For the purposes of this Act a retail shop lease is entered into when—

(a) under the retail shop lease, the tenant enters into possession of, or commences to pay rent in respect of, the premises the subject thereof; or

(b) where the retail shop lease is in writing, all of the parties thereto have signed the retail shop lease,

whichever first occurs. ”.

4. Section 13 of the principal Act is amended— Section 13 amended.

- (a) by repealing subsection (4) and substituting the following subsection—

“ (4) Where—

(a) the landlord under a retail shop lease holds the premises concerned under a head lease;

(b) it would be inconsistent with the head lease for the retail shop lease to continue until the day mentioned in subsection (1) (a) or (b), as the case may be; and

(c) that inconsistency is not, by reason of section 13A (1), removed,

the day that may be specified in a notice under subsection (1) as the day until which the retail shop lease is to be renewed shall be not later than the last day until which the retail shop lease can lawfully continue. ”;

and

- (b) in subsection (6), by deleting paragraph (b) and substituting the following paragraph—

“ (b) by reason that—

(i) it would be inconsistent with a head lease under which the premises are held by the landlord for the retail shop lease to continue; and

(ii) that inconsistency is not, by reason of section 13A (1), removed; ”.

Section 13A
inserted.

5. After section 13 of the principal Act the following section is inserted—

Avoidance
prevented.

“ 13A. (1) Subject to subsection (3), where—

- (a) the landlord under a retail shop lease holds the premises concerned under a head lease with which it would be inconsistent for the retail shop lease to continue until the day mentioned in section 13 (1) (a) or (b), as the case may be;
- (b) the head lessor and the head lessee under the head lease are related within the meaning given to that expression by subsection (4); and
- (c) the continuation of the retail shop lease as referred to in paragraph (a) would be consistent with the interest of the head lessor in the premises concerned,

the head lease shall be taken to be modified, by operation of this subsection, to the extent necessary to remove the inconsistency referred to in paragraph (a).

(2) Where agreement has not been reached upon any question as to the extent to which a head lease is modified by operation of subsection (1), a person having an interest in the resolution of the question may refer the question to the Registrar and Part III applies in relation to the hearing and the agreement or determination of the matter as if—

- (a) the question were a question arising under a retail shop lease; and

(b) the parties to the head lease and, where the person referring the question to the Registrar is not a party to the head lease, that person were the parties to the retail shop lease.

(3) The Registrar may, upon application made to him by the head lessor notice of which has been given to the head lessee and the tenant, determine that there are *bona fide* commercial reasons, other than the desire to avoid the operation of any provision of section 13, for the head lease and the provisions thereof giving rise to the inconsistency referred to in subsection (1) (a) and, if the Registrar so determines, subsection (1) is of no effect in relation to that head lease.

(4) For the purposes of this section the head lessor and the head lessee under a head lease are related if—

(a) one of them is, or is the spouse of, a lineal descendant of a grandparent of the other;

(b) one of them is, by section 7 (5) of the Companies (Western Australia) Code, deemed, for the purposes of that Code, to be related to the other;

(c) one of them is a corporation within the meaning given to that term by the Companies (Western Australia) Code and the other—

(i) is an officer, within the meaning given to that term by the Companies (Western Australia) Code, of that corporation;

- (ii) is a shareholder of, or holds a beneficial or contingent interest in a share in, that corporation;
 - (iii) is a discretionary or other beneficiary of a trust, the trustee of which is a shareholder of, or holds a beneficial interest in a share in, that corporation; or
 - (iv) is, or is the spouse of, a lineal descendant of a grandparent of a person described by subparagraph (i), (ii) or (iii);
- (d) one of them is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the other in relation to the premises the subject of the head lease;
- (e) one of them is—
- (i) an employee; or
 - (ii) an agent, a principal, a partner, a nominee, a solicitor, an accountant or an auditor,
- of the other or of a person bearing to the other any of the relationships mentioned in subparagraph (ii);
- (f) one of them is—
- (i) a trustee for the other; or
 - (ii) a trustee of a trust of which the other is a discretionary or other beneficiary.

(5) For the purposes of this section, where the head lessor or the head lessee, or each of those parties, comprises more than one person, a relationship of a kind mentioned in subsection (4) shall be taken to be established with a party if such a relationship is established with any of the persons of whom or of which that party is comprised. ”.
