



Commercial Tenancy (Retail Shops) Agreements Act 1985

**Commercial Tenancy (Retail Shops) Agreements
Amendment Regulations (No. 2) 2012**

Made by the Governor in Executive Council.

1. Citation

These regulations are the *Commercial Tenancy (Retail Shops) Agreements Amendment Regulations (No. 2) 2012*.

2. Commencement

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — when the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011* section 3 comes into operation.

3. Regulations amended

These regulations amend the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985*.

4. Part 1 heading inserted

Before regulation 1 insert:

Part 1 — Preliminary

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5. Regulation 3 replaced

Delete regulation 3 and insert:

3. Terms used

In these regulations —

Form means a form in Schedule 2;

option expiry day, in relation to a retail shop lease, that provides, whether directly or by operation of section 13 of the Act, an option or a further option of renewal of the lease exercisable by the tenant, means the date after which the option is no longer exercisable.

6. Part 2 heading inserted

After regulation 3 insert:

Part 2 — General matters

7. Regulations 3AA and 3AB inserted

Before regulation 3A insert:

**3AA. Defining or calculating area for the definition of
lettable area of a retail shop under section 3(1)**

- (1) The lettable area of a retail shop means so much of the surface floor area of the premises as are designed and available for use in carrying on the business that is, or will be, carried on at the shop.

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- (2) Each of the following areas is not part of the lettable area of a retail shop, unless a particular tenant has a right to the exclusive use of the area —
- (a) areas covered by awnings or similar coverings;
 - (b) balconies;
 - (c) areas under planter boxes;
 - (d) terraces;
 - (e) verandahs;
 - (f) public spaces;
 - (g) thoroughfares or access ways for the use of service vehicles or the delivery of goods;
 - (h) all other areas of a retail shop that are not reasonably capable of being used in carrying on the business that is, or will be, carried on at the shop.
- (3) Each of the following areas is not part of the lettable area of a retail shop, if the area is provided as a common facility in the building where the shop is situated, unless a particular tenant has a right to the exclusive use of the area —
- (a) access ways;
 - (b) cupboards;
 - (c) escalators, stairwells and landings;
 - (d) fire hose reel cupboards;
 - (e) lift shafts and lobbies;
 - (f) plant/motor rooms;
 - (g) recessed doorways;
 - (h) storage rooms;
 - (i) tea rooms and other service areas;
 - (j) telecommunications cupboards;

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- (k) toilets;
- (l) car park spaces;
- (m) entrance halls.

**3AB. Leases exempt from the operation of the Act —
definition of *retail shop lease* under section 3(1)**

The following leases are exempt from the operation of the Act —

- (a) a lease held by a body corporate whose securities are listed on the New Zealand Stock Exchange Limited;
- (b) a lease held by a subsidiary (as defined in the *Corporations Act 2001* (Commonwealth) section 9) of such a body corporate;
- (c) a lease of premises for the purpose of the lessee operating only a vending machine or automatic teller machine on those premises.

8. Regulation 3A amended

In regulation 3A:

- (a) in paragraph (c) delete “therapy;” and insert:

therapy and treatments;
- (b) in paragraph (d) delete “repair;” and insert:

repair (which may include key cutting and engraving);
- (c) in paragraph (e) delete “tapes.” and insert:

tapes, DVDs, electronic games or other similar amusements.

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9. Regulation 4A inserted

Before regulation 4 insert:

4A. Exemption from section 13C (section 4(4) and (5))

A landlord is exempt from section 13C of the Act in respect of a retail shop lease if —

- (a) but for that exemption, the landlord would be required under section 13C of the Act to notify a tenant in writing of an option expiry day provided under the lease; and
- (b) the landlord is unable to give that notice within the period of time provided under that section because the notice would need to have been given to the tenant before the commencement of the current term of the lease; and
- (c) the landlord has, on or before the commencement of the current term of the lease, notified the tenant in writing of the option expiry day.

10. Regulation 6A inserted

After regulation 5A insert:

6A. Defining or calculating area for the definition of *total lettable area* for premises that are not retail shops, under section 12(3)

The lettable area of any premises that are not retail shops is to be defined and calculated for the purposes of paragraph (b) of the definition of *total lettable area* in section 12(3) of the Act in the same manner as is

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prescribed under regulation 3AA but for that purpose —

- (a) a reference in regulation 3AA to “a retail shop” or to “shop” is to be read as a reference to “premises”; and
- (b) a reference in regulation 3AA to “in carrying on the business that is, or will be, carried on at the shop” is to be read as a reference to “by the tenant”.

11. Regulation 7 inserted

After regulation 6 insert:

7. Various provisions prescribed for retail shop leases

The provision set out in Schedule 1 column 2 —

- (a) opposite item 1 is prescribed under section 13(6)(da) of the Act for the purposes of section 13 of the Act; and
- (b) opposite item 2 is prescribed under section 14A(1)(a) of the Act for the purpose of section 14A of the Act.

12. Regulation 9 amended

In regulation 9(1) delete “Form 6.” and insert:

Form 4.

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13. Regulation 10 amended

In regulation 10 delete the Table and insert:

Table

Item	Section of Act	Description of matter
1.	11(3C)(b)	Application for an order that a landlord comply with a request made under section 11(3B) of the Act.
2.	12(1)(b)	Application for approval for proportion of operating expenses of a landlord payable by a tenant under a retail shop lease to be greater than the relevant proportion.
3.	12(1e)	Application for approval for contribution towards the operating expenses of a landlord payable by a tenant under a retail shop lease to exceed the amount calculated under section 12(1e)(b) of the Act.
4.	12A(3)(e)(ii)	Submission of a scheme of repayment for approval under section 12A(4) of the Act.
5.	12B(3)(e)(ii)	Submission of a scheme of repayment for approval under section 12B(4) of the Act.
6.	13(3)(a)	Application for approval for variation of the period during which an option to renew a lease is exercisable.

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Item	Section of Act	Description of matter
7.	13(7)	Application to approve of the inclusion in a retail shop lease of a provision under which a landlord may determine the lease at a time that is before the day set out in section 13(6)(aa) or (ab) of the Act, as is relevant.
8.	13(7b)	Application for an order that an option of renewal does not arise under section 13(1) of the Act.
9.	13A(3)	Application to determine that there are bona fide commercial reasons for an inconsistency referred to in section 13A(1)(a) of the Act.
10.	14A(3)	Application for the approval of the inclusion in a retail shop lease of a provision about the relocation of a tenant's business to be in a form other than a form prescribed for the purposes of section 14A of the Act.
11.	15F(6)	Application for an interim order pending final determination of an unconscionable conduct application under section 15F(1) of the Act.
12.	16D(6)	Application for an interim order pending final determination of a misleading or deceptive conduct application under section 16D(1) of the Act.

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Item	Section of Act	Description of matter
13.	16(1)	Referral of a question between the parties to a lease which a party believes to be a question arising under the lease, but only if urgent relief in the form of an order for a party to the lease to do, or refrain from doing, something is sought in conjunction with the referral.
14.	27(3)(b)	Application for a matter before the Tribunal to be transferred to a court.

14. Part 3 inserted

After regulation 10 insert:

**Part 3 — Transitional regulations arising from
the enactment of the *Commercial Tenancy
(Retail Shops) Agreements Amendment Act 2011***

11. Terms used

In this Part —

2011 amending Act means the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011*;

commencement day means the day on which the 2011 amending Act section 3 comes into operation.

12. Application of section 13C

- (1) Section 13C of the Act does not apply in respect of a retail shop lease if commencement day is during the period of 6 months before the option expiry day for that retail shop lease.

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- (2) If a landlord is required under section 13C of the Act to notify a tenant in writing of an option expiry day and commencement day is during the period described in column 1 of the Table then that section applies in respect of the retail shop lease as if subsection (1) of that section was modified to provide that the period of time during which the landlord is required to notify the tenant was the period set out in column 2.

Table

Commencement day falls during this period	Notice required to be given by landlord during this period
Period that is more than 6 months but not more than 9 months before the option expiry day for a retail shop lease	Period that is after commencement day but before the day that is 2 months before the option expiry day for the retail shop lease
Period that is more than 9 months but not more than 12 months before the option expiry day for a retail shop lease	Period that is after commencement day but before the day that is 3 months before the option expiry day for the retail shop lease

13. Pre-1 July 1999 leases

- (1) In this regulation —
- existing retail shop lease*** has the meaning given in Schedule 1 clause 3 of the Act;
- pre-1 July 1999 lease*** means a retail shop lease that was an existing lease, as defined in the *Commercial Tenancy(Retail Shops) Agreements Amendment Act*

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1998 section 14(1), in relation to a provision of that Act.

- (2) The amendments effected by the 2011 amending Act, other than —
 - (a) the amendments to section 11(2) of the Act set out in section 8(1) of that amending Act; and
 - (b) the amendments to section 12 of the Act set out in section 10 of the amending Act,apply to, and in relation to, a pre-1 July 1999 lease in the same way as they apply to, and in relation to, an existing retail shop lease.
- (3) Section 8(1) of the 2011 amending Act is to be taken to amend section 11(2) of the Act, as that provision applied to and in relation to a pre-1 July 1999 lease immediately before commencement day, as if it read as follows:
 - (1) In section 11(2) delete “lease.” and insert:

lease, and is not to take into account the value of —

 - (a) the goodwill of the business carried on in the retail shop; or
 - (b) any stock, fixtures or fittings in the retail shop that are not the property of the landlord; or
 - (c) any structural improvement, or alteration, of the retail shop carried out, or paid for, by the current tenant.
- (4) Other than as specified in this regulation, the amendments effected by —
 - (a) the 2011 amending Act; and

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(b) the *Commercial Tenancy (Retail Shops) Agreements Amendment Regulations (No. 2) 2012*,

do not affect the operation of the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998* section 14.

15. Schedule 1 inserted

Before the Schedule insert:

Schedule 1 — Provisions for retail shop leases

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Item and description	Provision for retail shop lease
1. Entitlement by landlord to determine the lease Section 13(6)(da) of the Act	The landlord is entitled to determine the lease by reason of either of the following persons becoming, according to the <i>Interpretation Act 1984</i> section 13D, a bankrupt or a person whose affairs are under insolvency laws — <ul style="list-style-type: none"> (a) the tenant; (b) a guarantor of the tenant, if — <ul style="list-style-type: none"> (i) the tenant is a body corporate; and (ii) the guarantor is a director or a majority shareholder of the body corporate.
2. Relocation Section 14A(1)(a) of the Act	1.1. Terms used in this clause In this clause, unless the contrary intention appears — <i>landlord</i> means the person who is the landlord, as defined in the <i>Commercial</i>

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**Item and
description**

Provision for retail shop lease

Tenancy (Retail Shops) Agreements Act 1985 section 3(1), in relation to this lease;

new retail shop means a redeveloped retail shop or alternative retail shop that is the subject of an offer under subclause 1.5.1 or a substitute lease;

redevelopment, of the retail shop, includes any substantial repair, renovation, reconstruction or demolition of the retail shop, or the building or the retail shopping centre within which the retail shop is located;

retail shop means the premises the subject of this lease;

retail shopping centre, in relation to a retail shop, means the retail shopping centre as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* section 3(1), within which the retail shop is located;

substitute lease means a lease of a new retail shop that a landlord offers or provides under subclause 1.5;

tenant means the person who is the tenant, as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* section 3(1), in relation to this lease;

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**Item and
description**

Provision for retail shop lease

termination date, in relation to the termination of this lease under this clause, means the date set out in a termination notice for the lease referred to in subclause 1.3.3(b).

**1.2. Landlord may terminate lease to
redevelop**

The landlord may terminate this lease in accordance with this clause if the retail shop, or the building or the retail shopping centre within which the retail shop is located, is to be the subject of a redevelopment and —

- (a) the landlord reasonably requires vacant possession of the retail shop to enable the redevelopment to be carried out; or
- (b) the landlord cannot ensure safe access to the retail shop while the redevelopment is being carried out.

**1.3. Notice of termination for
redevelopment**

- 1.3.1 The landlord must give the tenant written notice of termination of this lease (a *termination notice*) under this clause.
- 1.3.2 A termination notice must be given at least 6 months before the termination date.

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Item and description	Provision for retail shop lease
1.3.3	A termination notice must contain the following — (a) the details of the proposed redevelopment; (b) the date on which this lease terminates (the <i>termination date</i>); (c) notice of the tenant's right to make a claim for compensation under subclause 1.7.
1.3.4	The termination date does not need to coincide with the end of a rental period.
1.4.	Termination of lease under this clause
1.4.1	On the termination date this lease terminates.
1.4.2	On termination of this lease under this clause, the tenant is not under any obligation under this lease to make good the retail shop, despite any other clause in this lease to the contrary.
1.5.	Offer by the landlord to lease redeveloped retail shop or alternative retail shop
1.5.1	At the time a termination notice is given to a tenant, the landlord must make an offer (the <i>offer</i>) to lease to the tenant — (a) the redeveloped retail shop; or (b) an alternative retail shop.

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Item and description	Provision for retail shop lease
1.5.2	For the purposes of subclause 1.5.1(b), if the retail shop is situated in a retail shopping centre, the alternative retail shop is also to be situated in that retail shopping centre.
1.5.3	If the landlord does not offer the tenant a substitute lease then the landlord is liable to pay relocation costs and compensation in accordance with subclauses 1.6 and 1.7.
1.5.4	The offer must be in writing.
1.5.5	Unless otherwise agreed between the parties, the new retail shop that the landlord offers to lease to the tenant under subclause 1.5.1 must — <ul style="list-style-type: none"><li data-bbox="759 1263 1193 1391">(a) be located in a position that has an estimated trading potential similar to that of the retail shop; and<li data-bbox="759 1413 1214 1473">(b) have a floor configuration similar to that of the retail shop; and<li data-bbox="759 1496 1209 1556">(c) have a lettable area similar to the lettable area of retail shop; and<li data-bbox="759 1579 1198 1740">(d) meet all requirements of current health, safety, building, fire and other relevant legislation for the use to which the retail shop is to be put by the tenant.

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**Item and
description**

Provision for retail shop lease

- 1.5.6 The offer for the lease of the new retail shop must contain the following —
- (a) details of the new retail shop;
 - (b) the date by which the tenant must accept the landlord's offer (which must be at least 60 days after the date of the offer);
 - (c) that the tenant's acceptance of the offer must be in writing;
 - (d) the rent per annum for the new retail shop, which is to be no more than the rent under this lease for the retail shop;
 - (e) the terms and conditions of the lease, which are to be the same, or better, terms and conditions as this lease except that the term of the substitute lease is to be no shorter than the remainder of the term of this lease;
 - (f) the date, or estimated date, on which the lease is to commence;
 - (g) the date, or estimated date, on which the tenant can access the retail shop to fit it out;
 - (h) a statement that the tenant should seek independent legal and financial advice about the offer and the new retail shop.

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Item and description	Provision for retail shop lease
1.5.7	Without limiting subclause 1.5.6(e), the proportion of operating expenses to be paid by the tenant under the substitute lease must not be greater than the proportion of operating expenses to be paid by the tenant under this lease.
1.5.8	If the tenant accepts the offer on or before the date specified under subclause 1.5.6(b) — (a) the landlord must provide the tenant with a substitute lease for the new retail shop not later than 21 days after the tenant accepts the offer; and (b) the tenant is to execute the substitute lease and return it to the landlord not later than 60 days after being provided with the lease by the landlord.
1.5.9	The substitute lease must be on the same terms and conditions as this lease, except that — (a) the commencement date for the substitute lease will be — (i) such date as is agreed between the parties; or (ii) if a date is not agreed between the parties, 30 days after the new retail shop is made available for the tenant to fit it out;
	and

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Item and description	Provision for retail shop lease
	<p>(b) if the term of the substitute lease extends beyond the term of this lease, the dates on which the rent is reviewed or adjusted during that term or additional term will occur in the same manner as are provided for under this lease; and</p> <p>(c) the lease is to make provision to the following effect —</p> <ul style="list-style-type: none"><li data-bbox="815 987 1224 1352">(i) if the landlord cannot provide the tenant with access to the new retail shop under the substitute lease due to the redevelopment or any other unforeseen circumstance, then the tenant may terminate the substitute lease at any time by giving the landlord written notice of the termination;<li data-bbox="815 1368 1224 1536">(ii) the landlord has no claim against a tenant for the termination of the lease in the circumstances set out in subparagraph (i);<li data-bbox="815 1552 1224 1778">(iii) the termination of the substitute lease in those circumstances is to be treated as a termination of this lease under this clause for the purposes of subclause 1.7.

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Item and description	Provision for retail shop lease
1.5.10	<p>The landlord is responsible for arranging the preparation of the substitute lease and the landlord is to bear the following costs —</p> <ul style="list-style-type: none"><li data-bbox="759 808 1214 936">(a) the cost of, and associated with, the preparation, and execution, of the substitute lease and any deed of surrender of this lease;<li data-bbox="759 958 1214 1151">(b) the cost of the tenant's reasonable legal costs in relation to the termination of this lease, advice on the offer and the substitute lease and the execution of the substitute lease.
1.6	Landlord to pay tenant's reasonable removal and relocation costs
1.6.1	<p>If this lease is terminated under this clause, the landlord is to pay the tenant's reasonable costs of removal from the retail shop and, if relevant, the relocation of the tenant's business to another place (whether provided under a substitute lease or not) including, but not limited to —</p> <ul style="list-style-type: none"><li data-bbox="759 1547 1214 1644">(a) costs incurred by the tenant in dismantling fittings, equipment or services; and<li data-bbox="759 1666 1214 1861">(b) costs incurred by the tenant in replacing, re-installing or modifying finishes, fittings, equipment or services to the standard existing in the existing retail shop immediately before

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Item and description	Provision for retail shop lease
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the relocation, but only to the extent that they are reasonably required in the other place; and

- (c) packaging and removal costs incurred by the tenant.

- 1.6.2 The landlord is to pay to the tenant the reasonable costs of the removal and relocation in accordance with this subclause as soon as is reasonably practicable after the removal from the retail shop by the tenant but in any event not later than 30 days after a claim for costs under this clause has been given to the landlord by the tenant.

1.7. Tenant's right to compensation

- 1.7.1 If this lease is terminated under this clause, or under a provision of an alternative lease referred to in subclause 1.5.9(c), the landlord is liable to pay the tenant reasonable compensation for loss and damage (including loss of goodwill) suffered by the tenant due to the termination of this lease, taking into account all relevant factors.
- 1.7.2 Despite subclause 1.7.1, the landlord is only liable to pay the written down value of the costs of fitting out the retail shop as at the termination date, calculated in accordance with the current method used by the Australian

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**Item and
description**

Provision for retail shop lease

Taxation Office for the depreciation of assets.

- 1.7.3 The tenant must give the landlord written notice of the loss or damage as soon as reasonably practicable after it is suffered but a failure to do so does not affect any right of the tenant to compensation.
- 1.7.4 Subclause 1.7.1 applies whether or not —
- (a) the landlord offers the tenant a substitute lease; or
 - (b) the tenant accepts an offer of a substitute lease; or
 - (c) a substitute lease is entered into by the parties; or
 - (d) the terms of a substitute lease entered into are not complied with; or
 - (e) a substitute lease is terminated in accordance with a provision of that lease referred to in subclause 1.5.9(c).
- 1.7.5 The landlord is to pay to the tenant compensation in accordance with this subclause as soon as is reasonably practicable after the termination date, but in any event not later than 30 days after a claim for compensation under this clause has been given to the landlord by the tenant.

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**Item and
description**

Provision for retail shop lease

1.8. Abatement of rent

1.8.1 The landlord must allow the tenant an abatement of rent, and other occupancy costs, for any period of time during which the tenant cannot reasonably carry on the tenant's business in the new retail shop after the termination date of this lease —

- (a) because the tenant needs to fit out the new retail shop and to relocate the tenant's fixtures, fittings, furnishings, plant and equipment and stock-in-trade from the retail shop to the new retail shop; or
- (b) because the landlord had not provided the tenant with access to the new retail shop; or
- (c) because of any other actions of the landlord.

1.8.2 Subclause 1.8.1(a) does not apply to any period of time where there is unreasonable delay in fitting out the new retail shop and installing the fixtures, fittings, furnishings, plant and equipment, and stock-in-trade in the new retail shop, unless the delay is outside of the control of the tenant.

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Item and description	Provision for retail shop lease
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1.9. Dispute resolution

Any question between the landlord and the tenant arising under this lease may be referred to the State Administrative Tribunal, or made the subject of a request to the Small Business Commissioner, where relevant, in accordance with the *Commercial Tenancy (Retail Shops) Agreement Act 1985*.

16. Schedule amended

- (1) In the Schedule delete:

Schedule

Forms

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and insert:

Schedule 2 — Forms

(2) In the Schedule delete Form 1 and insert:

FORM 1

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 6(4)

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DISCLOSURE STATEMENT

- Part 1 Premises
- Part 2 Lease term and option/s to renew lease
- Part 3 Works, fitout and refurbishment
- Part 4 Rent
- Part 5 Outgoings/Operating expenses
- Part 6 Other costs
- Part 7 Alteration works (including renovations,
extensions, redevelopment, demolition)
- Part 8 Trading hours
- Part 9 Retail shopping centre details
- Part 10 Group of premises
- Part 11 Other disclosures
- Part 12 Landlord acknowledgments and signing

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Part 13 Tenant acknowledgments and signing

Part 14 Attachments

Landlord	
Tenant	
Premises	
KEY DISCLOSURE ITEMS	
1 Annual base rent under the lease See item 10.1	\$ p.a. Including GST/Excluding GST
2 Is rent based on turnover payable by the tenant in year 1 See item 12	<input type="checkbox"/> Yes <input type="checkbox"/> No
3 Total estimated outgoings/operating expenses, promotion and marketing costs and contributions to sinking fund for the tenant in year 1 See Item 14.2 and Part 6	\$ Including GST/Excluding GST
4 Term of the lease See item 5.2	Years months
5 Commencement date is See item 5.1	/ /20 Actual/estimated <i>[Insert the commencement date, or details of how the commencement date is to be determined, e.g. on receipt of council approval]</i>

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<p>6 Handover date is See item 7.1</p>	<p>/ /20 Actual/estimated <i>[Insert the handover date, or details of how the handover date is to be determined, e.g. on receipt of council approval]</i></p>
<p>7 Does the tenant have an option to renew for a further period (to be exercised in the manner specified, on or before the last date stated in the option clause) See item 6</p>	<p><input type="checkbox"/> Yes - see item 6.1 <input type="checkbox"/> No</p>
<p>8 Does the lease provide the tenant with exclusivity in relation to the permitted use of premises See item 2.2</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>

Disclosure item	Response
PART 1 — PREMISES	
1 Premises details	
<p>1.1 Street address of premises</p>	<p><i>[Insert street address of premises and, as applicable, shop number, name of the building/centre in which the premises is located, street address of the building/centre]</i></p>
<p>1.2 Plan of premises (if available)</p>	<p><i>[Insert description of premises by reference to a prepared plan. Attach the plan to this disclosure statement at item 38.1]</i></p>

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Disclosure item	Response
1.3 Lettable area of the premises (in m ²)	New premises - approximately m ² Existing premises — certified at m ² Will a survey be conducted? <input type="checkbox"/> Yes <input type="checkbox"/> No
1.4 Existing structures, fixtures, plant and equipment in the premises provided by the landlord at the cost of the landlord (excluding any works, fitout and refurbishment described in Part 3)	<i>[Select as appropriate]</i> <input type="checkbox"/> air conditioning <input type="checkbox"/> plastered walls <input type="checkbox"/> cool room/freezer <input type="checkbox"/> shop front <input type="checkbox"/> floor coverings <input type="checkbox"/> sink <input type="checkbox"/> grease trap <input type="checkbox"/> sprinklers <input type="checkbox"/> hot water service <input type="checkbox"/> suspended ceilings
	<input type="checkbox"/> lighting <input type="checkbox"/> telephone <input type="checkbox"/> mechanical exhaust <input type="checkbox"/> water supply <input type="checkbox"/> painted walls <input type="checkbox"/> waste <input type="checkbox"/> electrical distribution load (3 phase) <input type="checkbox"/> electrical distribution load (single phase) <input type="checkbox"/> separate utility meter — gas <input type="checkbox"/> separate utility meter — water

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Disclosure item	Response
	<input type="checkbox"/> separate utility meter — electricity <input type="checkbox"/> other <i>[Please specify]</i>
1.5 Services and facilities provided by the landlord for the benefit of the premises	<i>[Select as appropriate]</i> <input type="checkbox"/> tenancy cleaning <input type="checkbox"/> common area cleaning <input type="checkbox"/> common area lighting <input type="checkbox"/> security services <input type="checkbox"/> bin rooms <input type="checkbox"/> child minding facilities <input type="checkbox"/> staff toilets <input type="checkbox"/> other <i>[please specify]</i> <i>[Note: The tenant should ensure that the nature of the services and facilities are suitable to the tenant's requirements]</i>
1.6 Other special requirements of the tenant in relation to the premises	<input type="checkbox"/> air control <input type="checkbox"/> delivery access <input type="checkbox"/> drainage <input type="checkbox"/> floor loading <input type="checkbox"/> wall loading <input type="checkbox"/> other <i>[please specify]</i>
2 Permitted use	
2.1 Description of permitted use	<i>[Note: the tenant should investigate if the proposed use of the premises is permitted under planning laws]</i>
2.2 Is the permitted use described in item 2.1 exclusive to the tenant?	<input type="checkbox"/> Yes <input type="checkbox"/> No
2.3 Is there any restriction on the provision of any goods and services by the tenant?	<input type="checkbox"/> Yes <i>[insert details]</i> <input type="checkbox"/> No

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Disclosure item	Response
2.4 Do the premises meet all requirements of current health, safety, building and fire legislation for the permitted use?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not known
3 Number of car parking spaces	
3.1 Approximate total spaces	spaces
3.2 Available spaces for customers of the building/centre	spaces
3.3 Reserved spaces for use of the tenant only	spaces
4 Head lease	
4.1 Is the premises under a head lease or Crown lease?	<input type="checkbox"/> Yes <input type="checkbox"/> No <i>[Note: a tenant who is a sublessee should seek independent legal advice on the security of the tenant's tenure]</i>
4.2 If this is a Crown lease, is the Minister's consent to the lease required?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not applicable
4.3 Has the landlord provided a copy of the head lease or Crown lease to the tenant?	<input type="checkbox"/> Yes – attached at item 38.2 <input type="checkbox"/> No <input type="checkbox"/> Not applicable

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Disclosure item	Response
4.4 Current term under the head lease or Crown lease and option/s to renew	<input type="checkbox"/> Not applicable <input type="checkbox"/> Details of head lease as follows: Current term: Years: / /20 to / /20 Options to renew: Years: / /20 to / /20 <i>[List any options for further terms held by the landlord under the head lease]</i>
4.5 Is the head landlord's consent to the lease required?	<input type="checkbox"/> Yes <input type="checkbox"/> No
4.6 Do any rights or obligations of the landlord under the head lease affect the premises?	<input type="checkbox"/> Yes <input type="checkbox"/> No <i>[Insert details]</i>
PART 2 — TERM OF LEASE AND OPTION/S TO RENEW LEASE	
5 Term of lease	
5.1 Date lease commences (see also date of handover at item 7)	/ /20 Actual / Estimate <i>[Insert the commencement date, or details of how the commencement date is to be determined, e.g. on receipt of council approval]</i>
5.2 Length of term	Years months

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Disclosure item	Response		
5.3 Date lease expires (based on the date indicated at item 5.1 as the date the lease commences)	/ /20		
6 Option/s to renew lease			
6.1 Option/s details	<input type="checkbox"/> Not applicable <input type="checkbox"/> Options as follows:		
	Length of option	Period of option	Exercise date
years		/ /20	/ /20
		to	to
		/ /20	/ /20
		Actual/ Estimate	Actual/ Estimate
years		/ /20	/ /20
		to	to
		/ /20	/ /20
		Actual/ Estimate	Actual/ Estimate
<i>[List all options to renew lease.]</i>			
<i>[Note: an option to renew a lease must be exercised in the manner specified in the lease and given to the landlord on or before the last day stated in the option clause of the lease]</i>			
How option is to be exercised			
<i>[Describe the method by which the tenant must exercise the option to renew the lease, e.g. in writing, orally]</i>			

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Disclosure item	Response
PART 3 — WORKS, FITOUT AND REFURBISHMENT	
7 Date of handover	
7.1 Date of handover on which premises will be available for occupation or fitout (if different to the date the lease commences indicated at item 5.1)	<p>/ /20 Actual / Estimate</p> <p><i>[Insert the handover date, or details of how the handover date is to be determined, e.g. on receipt of council approval]</i></p>
8 Landlord's works	
8.1 Description of works to be carried out by the landlord before the date lease commences (exclude any works that form part of the tenant's fitout at item 9)	
8.2 Is the tenant required to contribute towards the cost of any of the landlord's finishes, fixtures, fittings, equipment, or services?	<p>See lease clause</p> <p><i>[Insert details of tenant's contribution.]</i></p> <p><i>[Note: the Act provides that any clause in a lease in respect of premises in a retail shopping centre requiring a tenant to pay costs in respect of the amortisation of capital costs in relation to the shopping centre is void (s. 12(2))]</i></p>
8.3 Estimate of expected contribution by the tenant towards the costs of the landlord's works	<p><i>[List items of work and costs]</i></p> <p><i>[Note: see also outgoings/ operating expenses (item 13) in relation to any maintenance and repairs outgoings and sinking fund (item 16)]</i></p>

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Disclosure item	Response
9 Tenant's fitout works	
9.1 Fitout works to be carried out by the tenant (excluding the landlord's works at item 8)	
9.2 Is the landlord providing any contribution towards the cost of the tenant's fitout?	<input type="checkbox"/> Yes — <i>[insert details of landlord's contribution, including any amortisation arrangements]</i> <input type="checkbox"/> No
9.3 Does the landlord have requirements as to the quality and standard of shop front and fitout?	<input type="checkbox"/> Yes <i>[Insert details or provide fitout guide]</i> <input type="checkbox"/> No
9.4 Are there any requirements for the tenant to refurbish or refit the premises during the term or at the end of the term of the lease?	<input type="checkbox"/> Yes <i>[Insert details of nature, extent and timing of the refurbishment or refitting requirements]</i> <input type="checkbox"/> No
PART 4 — RENT	
10 Annual base rent	
10.1 Starting annual base rent (i.e. when the lease commences)	\$ Including/Excluding GST
10.2 Rent free period	<i>[Describe any rent free period]</i>
10.3 Date of rent commencement	/ /20

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Disclosure item	Response
10.4 How rent payments are to be made?	<i>[Insert description of how rent is paid, e.g. by equal monthly instalments in advance on the first day of each month, other than the first and last payments which are calculated on a pro-rata basis]</i>
10.5 Is there provision for abatement of rent on damage or destruction of the premises?	<input type="checkbox"/> Yes <input type="checkbox"/> No See lease clause: <i>[Insert details]</i>
11 Rent adjustment (rent review)	
11.1 Rent adjustment date/s and adjustment method	<i>[Insert a list of all rent adjustment dates and adjustment methods, e.g. fixed increase by ###%, fixed increase by \$###, market rent, indexed to CPI]</i>
12 Rent based on turnover	
12.1 Is rent based on turnover payable by the tenant?	<input type="checkbox"/> Yes — <i>[Insert method of calculation for turnover rent]</i> <input type="checkbox"/> No <i>[Note: If any part of the tenant's rent is calculated by reference to the turnover of the tenant's business, the Act provides that the tenant must elect in writing on the form titled:</i>

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Disclosure item	Response
	<p>Notice of Election that Rent be Determined by Reference to Turnover (Form 2 of the Commercial Tenancy (Retail Shops) Agreements Regulations 1985) to make those payments (s. 7).</p> <p>The tenant should understand the full implications of this method of rent calculation, which includes a requirement that the tenant disclose its trading figures to the landlord. The tenant is encouraged to seek independent legal and accounting advice]</p>
PART 5 — OUTGOINGS/OPERATING EXPENSES	
<p><i>[Note: The Act provides that a tenant cannot be required to contribute to the landlord's operating expenses related to extended trading hours unless the tenant chooses to open during those hours (s. 12(1)(c))]</i></p>	
<p>13 Contribution by tenant towards the landlord's outgoings/operating expenses</p>	
<p>13.1 Is the tenant required to pay or contribute towards the landlord's outgoings/operating expenses?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>13.2 Describe any period during which the tenant is not required to pay any outgoings/operating expenses</p>	
<p>13.3 Date on which payment of outgoings/operating expenses is to commence</p>	<p>/ /20</p>

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Disclosure item	Response
13.4 Frequency of operating expenses payments	<i>[Insert details of when payments are due]</i>
13.5 Formulae for apportioning outgoings/operating expenses	<p><i>[Insert formulae of how the outgoings payable by the tenant are to be apportioned]</i></p> <p>See lease clauses: <i>[Insert details]</i></p> <p><i>[Note: The tenant's proportion of operating expenses are to be no more than the "relevant proportion" determined in accordance with section 12 of the Act]</i></p>
13.6 Proportion of total operating expenses apportioned to the tenant (if applicable) as at the date of lease commencement	<i>[Note: The proportion of the total cost of operating expenses for the building/centre payable by the tenant may vary periodically]</i>
14 Outgoings/operating expenses estimates (annual) for the 12 month period _____ to _____	
	<p>For a list of operating expenses payable by the tenant see the annual estimate of expenditure attached and the following lease clauses: <i>[Insert details]</i></p> <p><i>[Attach a copy of the annual estimate of expenditure at item 38.3]</i></p>
14.1 Total outgoings/operating expenses for the building/centre	\$
14.2 Estimated tenant contribution to outgoings/operating expenses	\$

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Disclosure item	Response
PART 6 — OTHER COSTS	
15 Advertising and promotional costs	
15.1 Is the tenant required to contribute towards advertising and promotional costs (including marketing fund contributions) for the building/centre?	<input type="checkbox"/> Yes <input type="checkbox"/> No
15.2 Tenant's contribution to advertising and promotional costs per annum	<input type="checkbox"/> Not applicable <input type="checkbox"/> Yes — contribution per annum is \$ Actual/Estimate <input type="checkbox"/> Yes — contribution per annum is % of the rent (excluding GST) payable from time to time <input type="checkbox"/> Yes — <i>[Insert details of tenant's contribution per annum and how this is determined]</i>
15.3 Landlord's contribution to advertising and promotional costs per annum	
15.4 Does the tenant have any input into how the marketing and promotional fund is used?	<i>[Insert details as to how tenant can have input]</i>
16 Sinking fund for repairs and maintenance	
16.1 Is the tenant required to contribute towards a sinking fund for repairs or maintenance for the building/centre?	<input type="checkbox"/> Yes <input type="checkbox"/> No

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Disclosure item	Response
16.2 Tenant's contribution to sinking fund for repairs or maintenance per annum	<input type="checkbox"/> Not applicable <input type="checkbox"/> Yes — contribution per annum is \$ Actual/Estimate <input type="checkbox"/> Yes — contribution per annum is % of the rent (excluding GST) payable from time to time <input type="checkbox"/> Yes — <i>[Insert details of tenant's contribution per annum and how this is determined]</i>
17 Other monetary obligations and charges	
17.1 Outline any costs, arising under the lease, including upfront costs or other costs not part of the outgoings/ operating expenses and not referred to elsewhere in this disclosure statement	<input type="checkbox"/> costs following default <input type="checkbox"/> legal costs (as permitted by the Act) <input type="checkbox"/> interest on outstanding moneys <input type="checkbox"/> grease trap cleaning <input type="checkbox"/> pre-payment of rent or operating expenses <input type="checkbox"/> after hours security <input type="checkbox"/> after hours airconditioning <input type="checkbox"/> wet waste removal <input type="checkbox"/> other <i>[please specify]</i>
17.2 Compulsory contributory membership of Tenants' Association	<input type="checkbox"/> Yes <input type="checkbox"/> No Date on which contributions to commence:

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Disclosure item	Response
PART 7 — ALTERATION WORKS (INCLUDING RENOVATIONS, EXTENSIONS, REDEVELOPMENT, DEMOLITION)	
18 Alteration works	
18.1 Are there any alteration works, planned or known to the landlord at this point in time, to the premises or building/centre including surrounding roads during the term or any further term/s?	<input type="checkbox"/> Yes — <i>[Insert details of the proposed works]</i> <input type="checkbox"/> No
19 Orders of statutory or local authorities	
19.1 Are there any outstanding orders of a statutory authority or a local government affecting the premises?	<i>[Select one of the following and provide details]</i> <input type="checkbox"/> Yes — <i>[Insert details]</i> <input type="checkbox"/> No
<i>[Note: the tenant should make enquiries with the local government and statutory authorities relating to all regulations and proposed or approved alterations to the centre/building or the neighbourhood, including changes of zoning, roads, other centres etc.]</i>	
20 Clause/s in lease dealing with relocation, demolition and destruction	
20.1 Clause/s in lease providing for relocation of the tenants	Clause/s of the lease / Not applicable

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Disclosure item	Response
20.2 Clause/s in lease which provide/s for the total or partial demolition or destruction of the premises or building/centre	Clause/s of the lease / Not applicable
PART 8 — TRADING HOURS	
<i>[Note: The Act provides that any provision in a lease which requires a tenant to open at specified hours or times is void (s. 12C).]</i>	
21 Core trading hours relevant to the tenant	
Monday	a.m. to p.m.
Tuesday	a.m. to p.m.
Wednesday	a.m. to p.m.
Thursday	a.m. to p.m.
Friday	a.m. to p.m.
Saturday	a.m. to p.m.
Sunday	a.m. to p.m.
Public holidays	a.m. to p.m.
22 Tenant access to premises outside core trading hours	
22.1 Is the tenant permitted to access the premises and building/centre outside the core trading hours?	<input type="checkbox"/> Yes — <i>[Provide details including cost of access]</i> <input type="checkbox"/> No
PART 9 — RETAIL SHOPPING CENTRE DETAILS	
<i>[This Part must be completed only if the premises are in a retail shopping centre as defined in the Act (s. 3(1))]</i>	
23 Retail shopping centre details	
23.1 Total number of shops	shops

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Disclosure item	Response
23.2 Number of shops leased/occupied	<i>[Insert details for shops owned by the landlord]</i> Leased <ul style="list-style-type: none"> • Number occupied — • Number unoccupied — Number unleased
23.3 Total lettable area of the centre (in m ²)	m ² Actual/Estimate
24 Major/anchor tenants	
24.1 Major/anchor tenants and lease expiry dates	<i>[List all major and anchor tenants (e.g. department stores, discount department stores, supermarkets), and the dates on which leases held by those tenants expire]</i>
25 Floor plan and tenancy mix	
25.1 Floor plan showing tenancy mix, common areas, common area trading, kiosks and major tenants	Attached as per item 39.1
25.2 Does the landlord assure the tenant that the current tenant mix will not be altered by the introduction of a competitor	<input type="checkbox"/> Yes <input type="checkbox"/> No
26 Customer traffic flow information	
26.1 Does the landlord collect customer traffic flow information?	<input type="checkbox"/> Yes — attached as per item 39.2 <input type="checkbox"/> No

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Disclosure item	Response
27 Use of common areas	
27.1 Are common areas able to be used for trading?	<input type="checkbox"/> Yes — <i>[insert details of basis upon which trading permitted]</i> <input type="checkbox"/> No
28 Casual mall licensing for common areas	
28.1 Do you adhere to the Shopping Centre Council of Australia's Casual Mall Licensing Code of Practice?	<input type="checkbox"/> Yes — casual mall licensing policy attached as per item 39.3 <input type="checkbox"/> No
PART 10 — GROUP OF PREMISES	
<i>[This Part must be completed only if the premises are in a group of premises that are not classed as a retail shopping centre as defined by the Act (s. 3(1))]</i>	
29 Details of group of premises	
29.1 Total number of premises	premises
29.2 Number of premises in the group leased/occupied	<i>[Insert details for premises owned by the landlord]</i> Leased <ul style="list-style-type: none"> • Number occupied — • Number unoccupied — Number unleased
29.3 Total lettable area of the group of premises (in m ²)	m ² Actual/Estimate
PART 11 — OTHER DISCLOSURES	
30 Other disclosures	
30.1 Are there any current legal proceeding in relation to the lawful use of the premises or building/centre?	<input type="checkbox"/> Yes — <i>[provide details]</i> <input type="checkbox"/> No

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Disclosure item	Response
31 Representations by landlord	
31.1 Any other representations by the landlord or the landlord's agent	<i>[Landlord to insert details of any other oral or written representations made by the landlord or the landlord's agent]</i>
32 Representations by the tenant	
32.1 Any other representations by the tenant or the tenant's agent	<i>[Landlord to insert details of any other oral or written representations made by the tenant or the tenant's agent]</i>
33 Other agreements	
33.1 Any other agreements between the tenant and the landlord	<i>[Insert details of any other agreements between the tenant and the landlord]</i>
PART 12 — LANDLORD ACKNOWLEDGMENTS AND SIGNATURE	
34 Acknowledgments by landlord	
<p>By signing this disclosure statement, the landlord confirms and acknowledges that:</p> <ul style="list-style-type: none"> • this disclosure statement contains all representations in relation to the proposed lease by the landlord and the landlord's agents as at the date of this disclosure statement; and • this disclosure statement reflects all agreements that have been made by the parties; and • the landlord has not knowingly withheld information which is likely to have an impact on the tenant's proposed business. 	

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Disclosure item	Response
<p>Warnings to landlord when completing this disclosure statement:</p> <ul style="list-style-type: none"> • The tenant may have remedies including termination of lease if the information in this statement is misleading, false or materially incomplete. 	
<p>35 Landlord's signature</p>	
35.1 Name of landlord	<i>[Insert name of the landlord]</i>
35.2 Signed by the landlord or the landlord's agent for and on behalf of the landlord	
35.3 Name of landlord's authorised representative or landlord's agent	<i>[Insert name of the person signing with the authority of the landlord]</i>
35.4 Date	/ /20
<p>PART 13 — TENANT ACKNOWLEDGMENTS AND SIGNATURE</p>	
<p>36 Acknowledgments by the tenant</p>	
<p>By signing this disclosure statement, the tenant confirms and acknowledges that the tenant received this disclosure statement.</p>	
<p>Warnings to tenant:</p> <ul style="list-style-type: none"> • Before signing any offer to lease, lease or associated document the tenant should ensure that it fully understands this disclosure statement, the form of lease and the operating expenses budget and that the tenant has negotiated any change that it wishes to make; • Signing any of the above documents is legally binding on the tenant. 	

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Disclosure item	Response
<p>Before entering into a lease, tenants should consider these key questions:</p> <ul style="list-style-type: none"> • Does the planning authority allow your proposed use for the premises under planning law? • Is the security of your occupancy affected by: <ul style="list-style-type: none"> • mortgages, charges or encumbrances granted by the landlord? • rights and obligations under a head lease? • Do the premises comply with all requirements of building and safety legislation? Are the premises affected by outstanding notices by any authority? • Could your trading be affected by disturbances or changes to the building/centre? • Does the landlord require you to refurbish the premises regularly or at the end of the lease? • Can the landlord end the lease early even if you comply with the lease? • Are all the existing structures, fixtures and plant and equipment in good working order? • Are you required to make good the premises at the end of the lease? • Is the tenancy mix of the shopping centre (if applicable) likely to change during the course of the lease? — see item 25.2? • Who is responsible for building defects? • Who is responsible for maintenance, insurance, repairing or replacing finishes, fixtures and fittings, equipment and services? 	

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Disclosure item	Response
37 Tenant's signature	
It is important that a tenant seek independent legal and financial advice before entering into a lease.	
37.1 Name of Tenant	<i>[Insert name of the tenant]</i>
37.2 Signed by the tenant or for and on behalf of the tenant	
37.3 Name of the tenant's authorised representative	<i>[Insert name of the person signing with the authority of the tenant]</i>
37.4 Date	/ /20
PART 14 — ATTACHMENTS	
38 List of attachments	
38.1 Plan of premises (see item 1.2)	<input type="checkbox"/> Yes <input type="checkbox"/> Not applicable
38.2 Head lease or Crown lease (see item 4.2)	<input type="checkbox"/> Yes <input type="checkbox"/> Not applicable
38.3 Annual estimate of expenditure (outgoings/operating expenses) (see item 14)	<input type="checkbox"/> Yes <input type="checkbox"/> Not applicable
38.4 Additional attachments	<i>[List any additional attachments]</i>
39 List of attachments — retail shopping centre	
<i>[This item must be completed only if the premises are in a retail shopping centre as defined by in the Act (s. 3(1))]</i>	
39.1 Floor plan (see item 25.1)	<input type="checkbox"/> Yes <input type="checkbox"/> Not applicable
39.2 Customer traffic flow statistics (see item 26.1)	<input type="checkbox"/> Yes <input type="checkbox"/> Not applicable

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Disclosure item	Response
39.3 Casual mall licensing policy (see item 28.1)	<input type="checkbox"/> Yes <input type="checkbox"/> Not applicable
39.4 Additional attachments relating to the retail shopping centre	<i>[List any additional attachments relating to the retail shopping centre]</i>
<p>This disclosure statement is not complete unless it is accompanied by —</p> <ul style="list-style-type: none"> • a copy of the form of lease; and • the current year's annual estimates of expenditure for each item of operating expenses; and • a copy of the tenant guide (see Form 4 of the <i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i>). 	

(3) In the Schedule after Form 3 insert:

FORM 4

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 6A

[r. 9]

TENANT GUIDE

FOR NEW RETAIL SHOP LEASES FROM 1 JANUARY 2013

This guide is intended to assist you, as a tenant, to understand some of your legal rights and obligations in relation to a retail shop lease under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (the *Act*). This guide does not replace financial, legal or business advice.

The Act and the regulations are available from the State Law Publisher at www.slp.wa.gov.au.

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WHAT IS A RETAIL SHOP LEASE?

Entering into a lease for a retail shop means that you (the *tenant* or *lessee*) are entering into a legally binding contract with the landlord (or *lessor*). The lease agreement sets out your rights and obligations in relation to the use of the retail shop.

A lease cannot override the requirements of the Act.

The Act regulates some of the provisions which may be contained in your lease agreement, including the following:

- rent reviews
- options to renew a lease
- terminating a lease
- operating expenses (or outgoings)
- trading hours.

Which leases are covered by the Act?

The Act generally applies to leases for premises with a lettable area of 1 000 m² or less:

- that are used for carrying on a business and that are in a retail shopping centre
- that are not in a retail shopping centre, but that are used (or predominantly used) for the sale of goods by retail
- that are used for conducting a ‘specified business’ — specified businesses include, drycleaning, hairdressing, beauty therapy, shoe repair and video or DVD stores (a list of all specified businesses is available from the Department of Commerce at www.commerce.wa.gov.au).

There are some retail shops with a lettable area greater than 1 000 m² that are also covered by the Act — a list of these premises can be obtained from the Department of Commerce at www.commerce.wa.gov.au.

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The Act generally does not apply to leases to publicly listed companies.

(See section 3(1) of the Act, definition of retail shop lease.)

When is the lease “entered into”?

A lease is usually entered into when both parties have signed it. However, a lease is still valid even if the lease document hasn't been signed by the parties if:

- the tenant takes possession of the shop premises; or
- the tenant starts paying rent.

(See section 3(4) of the Act.)

What you should do:

- *if necessary, seek advice as to whether your lease is covered by the Act*
- *establish the area of the retail shop under the lease and have this verified if necessary.*

INFORMATION YOU SHOULD HAVE BEFORE ENTERING INTO A LEASE

Before entering into a lease you should do the following:

- carefully read this *tenant guide*
- carefully read the *disclosure statement* provided by the landlord or the landlord's agent
- carefully read any written *lease document (including any assignments, extensions or deeds of variation)*
- obtain *independent financial, legal and business advice*.

Rent, the term of the lease, options, outgoings and related costs are open to negotiation with the landlord. Make sure that you understand these, and all other aspects of the lease, before signing it. To avoid disputes at a later stage, you should make sure that all agreements that you have made are in writing and that the lease documents are

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consistent with any representations made by the landlord or the landlord's agents.

What you should do before signing or entering into a lease:

- *seek independent legal and business advice before entering into a lease*
- *make sure you understand the lease and your rights, liabilities and obligations before signing it*
- *seek advice from financial experts to ensure you understand the costs of running the business.*

Tenant Guide to be located in lease

A new retail shop lease must include this tenant guide at the front of the lease.

If the landlord does not give you a tenant guide, you may have the right to do either or both of the following:

- terminate (end) the lease at any time up to 60 days after the lease was entered into (after this time you may apply to the State Administrative Tribunal for an order to terminate the lease)
- apply to the State Administrative Tribunal for an order for compensation for any monetary loss suffered by you.

(See section 6A of the Act.)

Disclosure statement to be given to you by landlord

At least 7 days before a lease is entered into the landlord must give you a disclosure statement. The disclosure statement sets out important facts about the retail shop and the lease. A copy of this tenant guide, the form of lease and annual estimates of expenditure in relation to operating expenses should be attached to the disclosure statement.

If the landlord does not give you a disclosure statement or gives you a disclosure statement that is incomplete or contains incorrect

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information you may have the right to do either or both of the following:

- terminate (end) the lease at any time up to 6 months after the lease was entered into
- apply to the State Administrative Tribunal for an order for compensation for any monetary loss you have suffered.

The disclosure statement should be in a prescribed form (this form is Form 1 of Schedule 2 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au). It is important to read the statement carefully and make sure it includes all verbal and written agreements, promises or commitments made during negotiations with the landlord or the landlord's agent (for example, any representations about customer traffic).

The disclosure statement should also contain details about the following:

- the landlord's property, such as the total lettable area, tenancy mix and services provided
- the shop premises, such as location, area and services provided
- key terms and conditions of the lease such as rent, term of the lease, options to extend the term and rent review
- permitted use of the premises
- your contribution to the landlord's expenses (operating expenses)
- any additional charges payable by you, such as shop fitout or contributions to marketing and sinking funds.

By signing the disclosure statement you are acknowledging that you understand the basis for the retail shop lease with the landlord. If you do not understand or agree with anything in the disclosure statement you should advise the landlord immediately.

It is vital that you are satisfied that the disclosure statement sets out all relevant information regarding the retail shop and (where applicable)

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the shopping centre building and property. If necessary, you should check details by making relevant enquiries and by seeking appropriate independent legal or expert advice.

(See section 6 of the Act.)

What you should do:

- ***make sure that you understand the disclosure statement before signing it and ensure it includes any agreements you reached during negotiations and any promises made to you by the landlord or their agent.***

Disclosure by the tenant

The landlord may ask for details of your retailing experience and financial capacity to establish and trade profitably and professionally. Any information provided to the landlord by you must also be correct and contain no misleading information.

PERMITTED USE OF THE RETAIL SHOP

The permitted use clause in a lease is very important as it sets out the type of business that you can run from the premises. You should ensure that the description of permitted use is broad enough to cover the type of business that you want to operate and, if anticipated, to allow you to expand the business.

The kind of things to consider about permitted use include:

- for a hairdresser, does the permitted use include providing beauty treatments?
- for a takeaway shop, can the type of food be changed?
- your future plans for the business.

You should also check that any local government approvals are in place for the type of business that you plan to operate. Avoid potential disputes by getting the approvals you need in writing.

A permitted use clause in a lease does not mean that you have the exclusive right to carry on a particular type of business in a shopping

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centre. Exclusivity is a separate issue that needs to be agreed separately with the landlord and included in the lease agreement.

What you should do:

- ***make sure the lease and the landlord's disclosure statement describe the shop's permitted use and that this description is broad enough so you can expand or sell the business***
- ***check that local government approvals are in place for the business you plan to conduct — get the approvals in writing***
- ***confirm whether or not you have an exclusive right to carry on your particular type of business.***

TERM OF THE RETAIL SHOP LEASE

The term of a lease is the length of time for which you can rent the shop. The lease must set out the lease term and may also include one or more options to renew or extend the term.

The length of the term of the lease is critical because it should be long enough to enable you to recover your investment, make a profit and sell the business, if you wish.

Minimum of 5 years

In most cases, the Act gives a tenant who is entering into a new lease a right to a minimum 5 year lease term. The 5 year term can be a combination of the initial term and options to extend the lease (for example, an initial term of 2 years and an option to renew of 3 years). The initial term does not need to be 5 years.

If the lease does not provide for options to extend the lease to a 5 year term, you have a legal right to do so (often called a “statutory option”). You can exercise this option by giving the landlord written notice in the standard form at least 30 days prior to the expiry of the term of the lease (the standard form is Form 3 of Schedule 2 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au). Although the Act allows you to extend

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the lease to a 5 year term, you do not need to extend the lease for the whole of this period if you choose not to.

The right to a 5 year term will only apply to retail shop leases with a term of more than 6 months (this includes any lease where the tenant has been continuously in possession of the premises for more than 6 months).

(See section 13 of the Act.)

The term can be longer or shorter than 5 years

Even though the Act gives tenants a right to a minimum 5 year term, you can negotiate a term that is longer than 5 years (for example, a 10 year term, or a 5 year initial term with 2 options to renew for a further 5 years each).

In some circumstances, you may agree to a term shorter than 5 years, but this must be your decision and needs to be approved by the State Administrative Tribunal.

(See section 13(7b) of the Act.)

Exercising an option to renew

It is important that you exercise an option to renew a lease in the way set out in the lease (you may need to let the landlord know in writing and within certain timeframes). If you do not exercise an option to renew properly the landlord may not be obliged to renew the lease.

The Act requires the landlord to give you written notice of the expiry date for any options to renew (the date on which the option to renew is no longer valid). You must receive this notice between 6 and 12 months before the expiry date. If the landlord fails to give you notice the option expiry date may be extended.

(See section 13C of the Act.)

At the end of the lease term

At the end of the term of the lease and the use of any options to renew the lease, the landlord does not have to renew the lease and you will have no further rights to occupy the premises. In some instances the landlord may allow you to continue to occupy the premises on a month to month basis.

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Within 12 months before the end of the lease term you can make a written request to the landlord asking whether the landlord intends to renew the lease. The landlord must reply to such a request in writing within 30 days.

(See section 13B of the Act.)

What you should do:

- *seek advice as to the appropriate lease term for your business*
- *don't assume that you will get a new lease at the end of the lease term — you need to make sure that the term of your lease is appropriate for your business structure*
- *seek advice as to the landlord's intentions at the end of the lease term as early as possible so that you can plan accordingly.*

Does the lease include redevelopment or relocation clauses?

Many leases include a clause allowing a landlord to terminate a lease before the end of the agreed lease term if the premises are to be redeveloped. In some instances the landlord may offer to relocate a tenant to alternative premises.

For the initial 5 years of a lease term, a redevelopment or relocation clause may only be included in a lease if:

- it is in the prescribed form (see item 2 of Schedule 1 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au); or
- it has been approved by the State Administrative Tribunal (if the parties have agreed to a provision that is different to the prescribed form).

If 5 years of the term have already expired, then the clause must be in accordance with the provisions of the Act — which sets out requirements in relation to notice, offer of alternative premises,

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payment of the tenant's reasonable costs and payment of compensation.

(See section 14A of the Act.)

What you should do:

- ***carefully look at any redevelopment or relocation clause in the lease and consider:***
 - ***what commitment is the landlord giving about relocation of the shop – will the new location and rental be comparable to the current premises?***
 - ***what compensation is the landlord offering you if your trade is affected?***
 - ***what effect will it have on your business?***
- ***seek independent financial, legal and business advice on the clause.***

RENT

Rent is usually the largest ongoing payment required under a lease. The Act does not regulate what the rent should be. However, the Act includes some rules relating to rent based on turnover and review of rental.

Types of rent

The initial rent for a shop is a matter for negotiation between the landlord and the tenant. Rental for retail shops can vary considerably depending on the location, the size of the shop, the term of the lease and the type of business.

Some common methods of determining rent are:

- net rent — an agreed base rent plus a contribution to the landlord's operating expenses or outgoings
- gross rent — an all inclusive payment for all the shop's occupancy costs

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- semi-gross rent — an amount charged for rental inclusive of some outgoings (for example, the tenant may pay the semi-gross rent plus its proportion of rates and taxes)
- turnover rent or percentage rent — a component of rent that is determined as a percentage of the tenant's turnover during a specified period.

What you should do:

- *seek expert advice as to the basis for determining rent that best suits your business operations*
- *pay your rent on time — if you don't pay your rent, the landlord may be able to end your lease.*

Rent based on turnover

Some leases base rent (or a part of the rent) on a percentage of the turnover of the tenant's business.

If you have agreed to a rent based on turnover, then:

- the lease must set out an agreed formula
- your agreement must be formalised in writing on the prescribed form before the lease is entered into (the prescribed form is Form 2 of Schedule 2 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au).

The Act also recognises the confidentiality of turnover figures to a retail business and limits the use of this information.

(See section 7 of the Act.)

The landlord cannot require you to provide turnover figures unless your rent is to be based on turnover.

(See section 8 of the Act.)

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RENT REVIEW

Most leases will state that the rent will be reviewed at regular intervals.

At each review time the lease must set out a single basis on which the rent is to be reviewed, this can include:

- the market rent
- an increase by reference to the Consumer Price Index (CPI)
- a set percentage increase
- an agreed formula or combination, for example, CPI + 2%.

The types of review may vary over the life of the lease (the lease may state that reviews are to alternate between CPI and market review). However, the lease cannot give the landlord the right to choose the greatest return from a range of rent types at any one review (for example, the lease cannot state that the increase is to be CPI or 5% whichever is higher).

The lease may specify only one method of review at a time.

Market rent

The Act provides that market rent is the rent obtainable for the retail shop in a free and open market if it were vacant and to be let on similar terms.

The market rent is not to take into account:

- the goodwill of the business
- any stock, fixtures or fittings that are not the property of the landlord
- any structural improvements paid for or carried out by the current tenant.

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Market rent review

If your lease specifies a market rent review, the Act provides that both parties can initiate the market rent review process and if the parties cannot agree on the rental:

- appoint a licensed valuer (agreed to by both parties) to determine the new rental; or
- request that the Small Business Commissioner appoint a valuer to determine the rental; or
- each appoint a valuer to determine the rental.

A landlord is required under the Act to provide a valuer with certain information in relation to retail shops in a shopping centre or in the same building in order to assist the valuer to decide the market rent. A valuer must keep this information confidential.

A disagreement regarding the new rent may be referred to the Small Business Commissioner for mediation or to the State Administrative Tribunal for determination. Until the new rent is agreed, the current rent continues to apply. Once the higher or lower rent is agreed, adjustments will be backdated to the review date.

No “ratchet” clauses

Any provision in a lease about a market review that seeks to prevent the rent from rising or falling above or below a certain level is void. The lease must allow the rent to rise or fall to a level supported by market evidence, for example, a clause cannot stop the rent from decreasing on a market review.

(See section 11 of the Act.)

What you should do:

- ***make sure that you understand how your rent is to be calculated and what other payments may be required***
- ***consider whether your business can sustain the current rent, rent increases and operating expenses over the term of the lease.***

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**CONTRIBUTION TO THE LANDLORD'S OPERATING
EXPENSES OR OUTGOINGS**

You may be required to contribute to a proportion of the landlord's expenses. The landlord's expenses are described in the Act as operating expenses. Leases can also refer to them as "outgoings or variable outgoings".

Operating expenses are the costs of operating, repairing or maintaining the landlord's premises including any building common areas. Typically these costs include the rates and taxes, cleaning, air conditioning, security, insurances and other valid expenses of running the property.

Details about the operating expenses and their payment are to be set out in the lease and the disclosure statement.

No capital expenses or management fees

The landlord cannot recover the following from you as an operating expense:

- management fees
- capital expenditures in relation to a retail shopping centre (for example, asset replacement)

Operating expenses are not to exceed the "relevant proportion"

Your contributions to operating expenses are negotiable. The Act provides that a tenant cannot be required to contribute more than the "relevant proportion" in relation to an operating expense. Nothing prevents you from negotiating with the landlord to pay less than the relevant proportion.

The relevant proportion is calculated by comparing the lettable area of your shop to the total lettable area of the shopping centre or the group of premises to which the expense relates.

$$\text{relevant proportion} = \frac{\text{lettable area of shop}}{\text{total lettable area}}$$

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Referable expenses

In certain circumstances an operating expense may be incurred in relation to only some of the businesses in a centre or group of premises, for example, specialised cleaning used by only a few tenants. This is called a “referable expense” and can be allocated using the total lettable area of only the shops to which the referable expense relates.

What you should do:

- *make sure that you understand the operating expenses before signing the lease*
- *budget to meet the operating expenses payments.*

Landlord to provide estimates and statements for operating expenses

In order to recover operating expenses from you, the landlord must provide you with:

- an annual estimate of expenditure for each operating expense
- an audited operating expenses statement for each accounting period detailing all expenditure by the landlord (this statement must be given within 3 months after the end of the accounting period).

(See section 12 of the Act.)

SINKING FUNDS

If your shop is in a shopping centre and you have agreed to contribute to a fund for major repair and maintenance works, your contributions are protected under the Act. These funds are subject to accounting and audit provisions and should not be spent by the landlord on anything other than the purpose for which they are collected. These costs may be in addition to operating expenses charged under the lease.

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Capital works must be paid for by the landlord and would include such works as the construction of extensions to the shopping centre and the replacement of major plant and equipment.

(See section 12A of the Act.)

OTHER FUNDS AND RESERVES

The landlord is also required to properly account for the administration, expenditure and auditing of any other funds or reserves that you have agreed to contribute to for specific purposes such as for marketing or promotion. These costs may be in addition to operating expenses charged under the lease.

(See section 12B of the Act.)

FITOUT AND REFURBISHMENT

Tenants are usually responsible for the costs of installing fixtures and fittings in the shop (the *fitout*). There may be a standard of construction required for fitouts. You may also be responsible for some or all of the landlord's costs of preparing the shop for the fitout.

Fitout requirements must be detailed in the disclosure statement.

A provision in a lease requiring a tenant to contribute to the cost of any of the landlord's finishes, fixtures, fittings, equipment or services will be void unless the disclosure statement notifies the tenant about the effect of the provision.

(See section 12(3A) of the Act.)

The Act provides that a clause about refurbishment or refitting will be void unless it provides the tenant with enough detail about the required refurbishment or refitting as is necessary to indicate the nature, timing and extent of work required.

(See section 14C of the Act.)

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What you should do:

- *ensure that you understand your obligations with regards to the fitout of the premises*
- *if possible, obtain or prepare a condition report prior to entering into the lease so that you have evidence of its condition*
- *ensure you have a sufficient fitout budget as some fitout costs (for example cost of moving plumbing) are often overlooked*
- *discuss variations of standard fitout with the landlord — as this could cost you extra.*

LEGAL FEES

The Act prohibits the landlord from claiming legal or other expenses from you relating to:

- the negotiation, preparation or execution of the lease (or any renewal or extension of the lease)
- obtaining the consent of a mortgagee to the lease
- the landlord's compliance with the Act.

However, if you assign your lease or sub-let the premises, the landlord may claim from you any reasonable legal or other expenses incurred in connection with the assignment or sub-letting.

(See section 14B of the Act.)

TRADING HOURS

The trading hours for your shop may be affected by a number of matters.

Retail trading hours legislation in Western Australia sets out those hours that retailers may open (this can vary depending on the type of business you operate).

If your retail shop is located inside a shopping centre then for practical reasons the opening and closing times for the centre (***core hours***) may

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be different to the trading hours permitted by law. This should be set out in the disclosure statement by the landlord.

When do you have to open your shop?

A clause in a lease which requires you to open your premises at specified hours or for specified times is void under the Act. For example, you cannot be required to open your shop for the core hours for a centre. You can choose which hours to open your shop.

If you believe that your lease has not been renewed because you did not open at certain times you can apply to the State Administrative Tribunal for compensation.

(See section 12C of the Act.)

What you should do:

- *if your premises are in a shopping centre you should check that the core hours are suitable for your business*
- *find out whether you can open your shop at any times outside of the core hours and find out about what costs are involved*
- *remember that the lease can't require you to open your shop for specified hours or during specified times.*

Standard trading hours and operating expenses

The Act also sets out “standard trading hours” which are used only for the purposes of allocating operating expenses.

For the purposes of allocation of operating expenses “standard trading hours” are:

- 8.00 a.m. to 6.00 p.m. Monday, Tuesday, Wednesday and Friday
- 8.00 a.m. to 9.00 p.m. Thursday
- 8.00 a.m. to 5.00 p.m. Saturday.

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The Act provides that if you do not open outside standard trading hours, then you cannot be charged operating expenses related to the extended hours (for example, additional security costs).

If, however, you do open outside the standard trading hours, you may be required to pay operating expenses related to the extended hours. These expenses should be calculated based on the lettable area of those shops which were open during the extended hours.

If you are closed for a period during the standard trading hours (for example, if you do not open your shop until 10 a.m.), you may still be charged operating expenses for the time that you are closed, that is, between 8.00 a.m. and 10.00 a.m..

(See section 12(1)(c) of the Act.)

Retail trading hours law may allow you to open at times outside of the standard trading hours (for example, Sunday trading) - however:

- ***you can't be forced to open your business***
- ***you are not required to make a contribution to operating expenses relating to non-standard hours if you choose not to open during those times.***

VOID CLAUSES

The lease agreement and any other verbal or written agreements cannot include clauses that are contrary to any provision in the Act.

In addition, the Act specifically precludes the lease or any other agreement from containing clauses that:

- require a tenant to pay key money, which is any money or other benefit in addition to rent paid to the landlord or others for the right to lease retail shop premises (*See section 9 of the Act.*)
- prevent the tenant disclosing the rent it has agreed to third parties, such as other retail tenants or their valuers (*See section 11(2a) of the Act.*)

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- require the tenant to contribute to any fund that applies moneys to capital expenditure in a shopping centre, such as new building works (*See section 12(2) of the Act.*)
- require a tenant to open for specified hours or during specified times (*See section 12C of the Act.*)
- prevent a tenant from joining a tenant's association or similar body (*See section 12D of the Act.*)
- require a tenant to provide turnover figures to the landlord, unless the tenant has agreed to pay rent based on turnover (*See section 8 of the Act.*)

A clause in a lease that is contrary to the provisions of the Act is void and has no effect.

DISRUPTIONS — COMPENSATION BY THE LANDLORD

The Act states that, if your shop is in a shopping centre, you are entitled to seek reasonable compensation from the landlord if the landlord:

- inhibits or prevents your, or customer, access to the shop premises
- disrupts trading conditions, causing loss of profits to your business
- does not properly repair, maintain or clean the shopping centre premises or common areas.

You will only be entitled to compensation from the landlord if you have given the landlord notice in writing to rectify the problem and the landlord has not done so.

If you cannot agree the amount of compensation with the landlord, you can make an application to the State Administrative Tribunal for a decision as to the amount payable.

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In most cases, before making an application to the State Administrative Tribunal you must attempt to resolve the matter through the Small Business Commissioner's dispute resolution processes.

(See section 14 of the Act.)

UNCONSCIONABLE CONDUCT AND MISLEADING AND DECEPTIVE CONDUCT

The Act provides that neither the landlord nor the tenant can engage in conduct that is:

- unconscionable (conduct that is so harsh, oppressive or unreasonable that it goes against good conscience)
- misleading or deceptive.

The State Administrative Tribunal can hear a claim for unconscionable conduct or misleading and deceptive conduct and may make an order for payment of compensation or another appropriate order (such as an order to vary a lease or an order that a party stop doing something).

In most cases, before making an application to the State Administrative Tribunal you must attempt to resolve the matter through the Small Business Commissioner's dispute resolution processes.

(See Part IIA of the Act.)

ASSIGNMENT AND SUB-LEASING

During the term of the lease, your circumstances may change and you may want to sell your business and assign your lease or sub-let all or part of the premises.

Your responsibilities if you assign your lease

If you assign your lease the new tenant "takes over" and assumes all your rights and responsibilities including rent and any other obligations under the lease from the date of assignment.

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Although the Act gives you a right to assign your lease, the landlord may withhold consent on reasonable grounds. Examples of reasonable grounds include:

- if the landlord believes that the new tenant would not be able to meet their financial obligations; or
- if the proposed use of the premises is contrary to the use permitted in the lease.

You will need to write to the landlord seeking consent for assignment of the lease. If the landlord doesn't reply within 28 days, you are entitled to assume the landlord has consented to the assignment.

You may have to pay the landlord's reasonable expenses for assessing a prospective tenant to take over your lease.

Your responsibilities if you sub-lease your shop

If you sub-let all or part of your premises you effectively become the landlord and the person you sub-let to is your tenant. Sub-leasing means that you will still be responsible under the lease to your landlord (for example, you may be liable for the rent if the sub-lessee does not pay).

You will also have obligations to the person you sub-let to, for example, you will need to provide a tenant guide and disclosure statement to your sub-tenant.

Your lease may include restrictions on sub-leasing. You should check your lease and seek advice as to its requirements on sub-leasing.

You may need to write to the landlord seeking consent to sub-lease. If the landlord doesn't reply within 28 days, you are entitled to assume the landlord has consented to the sub-lease.

(See section 10 of the Act.)

What you should do:

- ***seek independent legal advice as to the requirements of the Act and your obligations on assignment or sub-leasing.***

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DEFAULT OR BREACH OF LEASE

Most leases allow the landlord to terminate (or end) the lease on a breach or default by the tenant (for example, failure to pay rent). You should ensure that you understand the procedures set out in the lease in relation to default. For example, in many instances, your obligation to pay future rent will continue even after a lease has been terminated.

DISPUTES BETWEEN THE TENANT AND LANDLORD

State Administrative Tribunal

If you are unable to resolve a dispute with your landlord over any aspect of your retail shop lease the Act allows the State Administrative Tribunal to deal with these disputes.

Either you or the landlord may initiate this action with the Tribunal by making an application and paying the appropriate fee. The Tribunal generally deals with matters through an initial directions hearing, a mediation process or in a hearing.

(See section 16 of the Act.)

Small Business Commissioner

In most cases, before making an application to the State Administrative Tribunal you must attempt to resolve the matter through the Small Business Commissioner's dispute resolution processes.

(See Part III of the Act and regulation 10.)

Advice about a dispute can be obtained from lawyers with property experience, the Small Business Development Corporation, industry sources, tenant advocates and retail representative groups.

KEEP RECORDS

You should make sure that you keep records of all agreements, undertakings, correspondence (including emails) and other communications with the landlord. Where possible you should confirm things in writing.

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Make sure that you diarise important dates in relation to your lease.

If you need to make a claim in the Tribunal you will need to provide appropriate evidence to support your claim.

- (4) In the Schedule delete Form 6.

By Command of the Governor,

N. HAGLEY, Clerk of the Executive Council.
