



Western Australia

Commercial Tenancy (Retail Shops) Agreements Regulations 1985

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Western Australia

Commercial Tenancy (Retail Shops) Agreements Act 1985

Commercial Tenancy (Retail Shops) Agreements Regulations 1985

1. Citation

These regulations may be cited as the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985*¹.

2. Commencement

These regulations shall come into operation on the day fixed for the coming into operation of the *Commercial Tenancy (Retail Shops) Agreements Act 1985*¹.

3. Term used: Form

- (1) In these regulations, unless the contrary intention appears —
Form means a form in the schedule.
- (2) A form prescribed by these regulations shall be completed in accordance with the direction specified in the form.

3A. Specified businesses prescribed under section 3(1)

Each of the following businesses is prescribed to be a “specified business” for the purpose of the definition of that expression in section 3(1) of the Act —

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- (a) drycleaning;
- (b) hairdressing;
- (c) beauty therapy;
- (d) shoe repair;
- (e) sale or rental of video tapes.

[Regulation 3A inserted in Gazette 16 Feb 1993 p. 1270.]

4. Disclosure statement by landlord

A disclosure statement given for the purposes of section 6(4) of the Act shall be in the form of Form 1.

5. Notice of election under section 7(1)(a)

An election under section 7(1)(a) of the Act shall be in the form of Form 2.

5A. Standard trading hours prescribed (section 12(1)(c))

In accordance with section 12(3), and for the purposes of section 12(1)(c), *standard trading hours* are —

- (a) 8.00 a.m. to 6.00 p.m. Monday, Tuesday, Wednesday and Friday;
- (b) 8.00 a.m. to 9.00 p.m. Thursday; and
- (c) 8.00 a.m. to 5.00 p.m. Saturday.

[Regulation 5A inserted in Gazette 18 Jun 1999 p. 2601-2.]

6. Notice of exercise of option under section 13(1)

A notice under section 13(1) of the Act by which the option referred to in that section is exercised shall be in the form of Form 3.

[7, 8. Deleted in Gazette 30 Dec 2004 p. 6907.]

9. Tenant guide prescribed (section 6A(4))

- (1) The tenant guide shall be in the form of Form 6.
- (2) The tenant guide is to be located at the front of the retail shop lease to which it relates.

[Regulation 9 inserted in Gazette 18 Jun 1999 p. 2602.]

10. Application to SAT - matters to which section 25D(1) does not apply

Section 25D(1) of the Act does not apply in respect of the matters set out in the Table.

Table

<u>Item</u>	<u>Section of the Act</u>	<u>Description of matter</u>
<u>1.</u>	<u>12(1)(b)</u>	<u>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</u>
<u>2.</u>	<u>12A(3)(e)(ii)</u>	<u>Submission of a scheme of repayment for approval under section 12A(4) of the Act</u>
<u>3.</u>	<u>12B(3)(e)(ii)</u>	<u>Submission of a scheme of repayment for approval under section 12B(4) of the Act</u>
<u>4.</u>	<u>13(3)(a)</u>	<u>Application for approval for variation of the period during which an option to renew a lease is exercisable</u>
<u>5.</u>	<u>13(7)</u>	<u>Application to approve of the</u>

r. 10

<u>Item</u>	<u>Section of the Act</u>	<u>Description of matter</u>
		<u>inclusion in a retail shop lease of a provision under which a landlord may determine the lease at a time that is before the expiry of the term that may be obtained by a tenant under section 13(1) of the Act</u>
<u>6.</u>	<u>13(7b)</u>	<u>Application for an order that an option of renewal does not arise under section 13(1) of the Act</u>
<u>7.</u>	<u>16(1)</u>	<u>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</u>

[Regulation 10 inserted in Gazette 23 Mar 2012 p. 1365-6.]

Schedule

Forms

FORM 1

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 6(4)

[Reg 4]

DISCLOSURE STATEMENT

This Disclosure Statement is not complete unless it is accompanied by a copy of the form of the lease, a Tenant Guide and a copy of the current year's itemised operating expenses budget.

WARNING TO TENANT

Before signing any offer to lease, lease or associated document the Tenant should ensure that he or she fully understands this Disclosure Statement, the form of lease, and the operating expenses budget and that the Tenant has negotiated any change he or she wishes to make.

Signing any of those documents will legally bind the tenant.

The Tenant should take independent legal and accounting advice before signing any document.

NOTE: If there is insufficient space for full disclosure on any part of this form please attach additional sheets.

PART A

LANDLORD'S DISCLOSURE TO PROSPECTIVE TENANT

CENTRE/BUILDING DETAILS:

Name of Centre/Building.....

Address of Centre/Building.....

.....

Current Number of Shops

- (a) Leased
 - (i) occupied.....
 - (ii) unoccupied.....
- (b) Unleased
 - (i) occupied.....
 - (ii) unoccupied.....

Current Total Lettable Area of Centre/Building

Current Parking Facilities

- (a) Approximate customer bays.....
- (b) Approximate tenant bays.....
- (c) Number of bays allocated exclusively to tenant.....

Centre/Building Facilities
and Services provided by
the Landlord available
for the Tenant's use.

(Delete if not applicable)

- Bin Rooms
- Common Area cleaning
- Common Area lighting
- Security
- Child minding centre
- Staff toilets
- Other:

NOTE: *The Tenant should ensure that the nature of those facilities and services are suitable to his or her requirements.*

Outstanding orders of Statutory or
Local Authorities affecting
the premises

YES NO

Changes physically affecting the
Centre/Building of which Statutory
or Local Authorities have notified
the Landlord, or of which the Landlord
is aware

YES NO

Alterations to the Centre/Building submitted to or approved by Statutory and Local Authorities and proposed to be commenced within the term of the Lease or any statutory or contractual option

YES NO

Redevelopment clause in Lease

YES NO

Total or Partial Destruction clause in Lease

YES NO

The premises meet all current health, safety, building and fire regulations for the proposed use

YES NO NOT KNOWN

***NOTE:** The Tenant should make his or her own enquiries with Statutory and Local Authorities relating to all regulations and proposed or approved alterations to the Centre/Building or the neighbourhood including changes of zonings, roads, other centres etc.*

Core trading hours of the Centre/Building

Mon..... to.....
 Tues..... to.....
 Wed..... to.....
 Thurs..... to.....
 Fri..... to.....
 Sat..... to.....
 Sun..... to.....

***NOTE:** Core hours may not exceed those permitted by legislation.*

After hours access to the Centre/Building and the premises at no cost to the Tenant

Mon..... to.....
 Tues..... to.....
 Wed..... to.....
 Thurs..... to.....
 Fri..... to.....
 Sat..... to.....
 Sun..... to.....

Permitted use of the common areas for trading

YES NO

If permitted, on the following basis

Current tenant mix with retail
classifications (*floor plan attached*)

Compulsory contributory
membership of Merchants'
Association

YES NO

Date on which contributions to
Association commence

PROPOSED TENANCY DETAILS:

1. **Premises**

Address of premises/shop number

Current total lettable area (if a retail shopping
centre) or retail floor area of the retail shop
(area as set out in the lease or as ascertained by
a licensed surveyor and agreed by the parties)

New premises Approximately.....square metres
(± 5%)

Existing premises Certified at.....square metres

Permitted Use of Premises

2. **Term**

Term of Lease years/months
From to

Options years/months
From to
..... years/months
From to

NOTE: *If the Tenant expects to extend his or her lease after the expiry of its
Term and options, the Tenant must make enquiries of the Landlord
before entering into the Lease.*

3. Occupation

Fixtures and fittings provided by the Landlord to the premises at the cost of the Landlord.

(Delete if not applicable)

- Air conditioning
- Electrical distribution board
- Lighting
- Painted walls
- Plastered walls
- Shop front
- Sink
- Sprinklers
- Suspended ceiling
- Telephone
- Water supply and waste
- Other:

Date on which the premises will be available for occupation or fit-out.

Landlord's requirements as to quality and standard of shop front and fit-out apply.

YES NO

(If yes, details are attached).

Landlord's contribution to shop front or fit-out (if any)

YES NO

(If yes, full details, including any amortisation arrangements, are attached).

4. Rent

Date on which rent
payments commence

Annual rent at commencement
Frequency of rent reviews

Frequency
.....
.....

Period	Basis for review
.....
.....
.....

(NOTE: Rent cannot be increased or decreased during a rent review dispute, but any increase or reduction that takes place after a resolution or determination of a dispute may be due from the date of the review)

Rent payable by reference to turn-over **YES NO**

If yes, basis of calculation

NOTE: *If any part of the Tenant's rent is calculated on the turn-over of his or her business, the Tenant must elect in writing on the form entitled "Notice of Election that Rent be Determined by Reference to Turn-over" (Form 2) to make those payments. The Tenant should understand the full implication of this method of rent calculation which includes a requirement for the Tenant to disclose his or her trading figures to the Landlord.*

The Tenant is encouraged to seek independent legal and accounting advice.

Abatement of rent on destruction or damage **YES NO**

5. Operating Expenses (Contributions to Landlord's expenses)

Operating expenses payable by the Tenant **YES NO**

Date on which operating expenses payments commence..... **Frequency**.....

Percentage of the total operating expenses cost apportioned to the premises

Current annual contribution of the premises to the budget attached **Approximately \$**

Currency of operating expenses year From.....to.....

NOTE: For a list of the operating expenses payable by the Tenant refer to the current budget attached and to Lease Clauses.....and....., and for the formula for the Tenants contributions to the Landlord's expenses see Lease Clauses.....and..... These contributions are subject to the "relevant proportion" as defined by the Act (s. 12)

NOTE: The proportion of the total cost of operating expenses for the Centre/Building payable by the Tenant might vary periodically.

6. Additional Charges payable by the Tenant

(Delete if not applicable)

- Costs following Tenant's default
- Grease trap cleaning
- Interest on outstanding money
- Legal fees for Landlord and for Tenant
- Pre-payment of rent or operating expenses
- Security and air conditioning (for after hours operation)
- Stamp duty
- Wet waste removal
- Other:

7. Landlord's Interest

Landlord's interest in **FREEHOLD** **LEASEHOLD**
the Centre/Building

If leasehold, term of years remaining under Landlord's lease

Details of rights and obligations of the Landlord under that lease which affect the premises

NOTE: If the Tenant is a sublessee he or she should seek independent legal advice on the security of his or her tenure.

GENERAL

List of other agreements between —

the Prospective Tenant and the Landlord

or

representations made by the Landlord

PART B

PROSPECTIVE TENANT'S REQUIREMENTS DISCLOSED TO
LANDLORD

You, the Tenant, have indicated to the Landlord special requirements in respect of the following: *(Details are attached)*.

(Delete if not applicable)

After hours access
Air conditioning
Air control
Cool rooms/freezers
Dedicated parking bays
Delivery access
Drainage
External equipment
Fire protection
Floor loading

Hot/cold water
Power/lighting
Security
Shop fit-out
Telephone/facsimile/radio
Tenancy cleaning
Wall loading
Wet/dry waste

Other: _____

You, the Tenant, have made representations to the Landlord which are relied on by the Landlord in respect of the following: *(Details are attached)*.

DECLARATION BY LANDLORD AND PROSPECTIVE TENANT

We acknowledge that this Disclosure Statement contains or refers to all agreements and representations that influence us to contemplate entering into the proposed lease of the premises.

Name of Landlord:

Address of Landlord:

Signed by or on behalf of the Landlord:

Date:

Name of Prospective Tenant:

Address of Prospective Tenant:

Signed by or on behalf of the Prospective Tenant:

Date:

[Form 1 inserted in Gazette 16 Feb 1993 p. 1270-6; amended in Gazette 18 Jun 1999 p. 2602-6.]

FORM 2

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 7(1)(a)

[Reg. 5]

**NOTICE OF ELECTION THAT RENT BE DETERMINED
BY REFERENCE TO TURNOVER**

TO

.....

.....

(Full name and address of the landlord)

1. Where retail shop is in a retail shopping centre —

.....

(Name and address of retail shopping centre)

.....

(Number of the retail shop)

or

2. Where the retail shop is not in a retail shopping centre —

.....

(Address of retail shop)

3. Where the tenant has entered into occupation of the retail shop —

.....

(the business name under which the tenant conducts business)

I,.....

(Full name of tenant)

of

(residential address of tenant, or address of registered office if tenant is
a body corporate)

being the tenant of the abovenamed retail shop, give notice that I elect that the rent is to be determined *in whole/*in part by reference to the turnover of the business.

Dated:

.....
(Signature of tenant or where tenant is a body corporate, the signature of a person duly authorised by the body corporate to give this notice).

* Strike out whichever does not apply.

[Form 2 amended in Gazette 18 Jun 1999 p. 2606.]

FORM 3

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 13(1)

[Reg. 6]

NOTICE OF EXERCISE OF OPTION

TO

of.....

(Full name and address of landlord as
shown for service of notices in lease)

1. Where a retail shop is in a retail shopping centre —

.....
(Name and address of retail shopping centre)

.....
(Number of retail shop)

or

2. Where retail shop is not in a retail shopping centre —

.....
(Address of retail shop)

3.
(Business name under which tenant conducts business)

I,
(Full name of tenant)

.....
(Residential address of tenant or address of registered office if tenant
is a body corporate)

being the tenant of the abovenamed retail shop under —

- (a) a lease dated,
between.....
(insert the names of each party to the lease and the capacity
of each party, e.g. lessor, lessee, guarantor)

and (where applicable)

- (b) an assignment of lease dated
between
.....
(insert the names of each party to the assignment of lease
and the capacity of each party, e.g. lessor, assignor, assignee,
guarantor)

The current term of the lease of the abovenamed retail shop expires on
.....

Under section 13(1) of the *Commercial Tenancy (Retail Shops) Agreements Act 1985*, I give notice that I exercise my option to renew the lease of the abovementioned retail shop for a term commencing immediately after the expiry of the current term and expiring on

Date:

(Signature of tenant or if tenant is a body corporate, the signature of a person duly authorised by the body corporate to give this notice).

[Form 3 amended in Gazette 18 Jun 1999 p. 2606.]

[Forms 4 and 5 deleted in Gazette 30 Dec 2004 p. 6907.]

FORM 6

Commercial Tenancy (Retail Shops) Agreements Act 1985

[Section 6A]

.....
TENANT GUIDE

FOR NEW RETAIL SHOP LEASES FROM 1 JULY 1999
.....

TO THE NEW TENANT (“LESSEE”)

Entering into a lease of retail shop premises for your business means you are entering into a contract that creates binding legal obligations between yourself and the Landlord (“Lessor”).

Before you enter into a lease, you should fully understand your obligations, liabilities and rights under the lease.

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (and its amendments) contains provisions regulating retail shop leases, many of which will over-ride any contrary provision in a lease.

A lease provision that is contrary to the provisions of the Act has no effect (“void”).

To make sure you understand your obligations, liabilities and rights before entering into the lease you should:

- ◆ carefully read this *Tenant Guide*;
- ◆ carefully read any *Disclosure Statement* provided by the landlord or the landlord’s agent;
- ◆ carefully read any written lease document;
- ◆ obtain independent advice.

This Tenant Guide is merely a guide intended to help you to understand some of your legal obligations under a retail shop lease and, in particular, to understand your rights under the Act. You should not rely on this Guide as a substitute for reading the documents and obtaining independent advice before signing any Offer to Lease, Agreement to Lease, or any other related documents.

ADVICE BEFORE ENTERING THE LEASE

The Act provides that your retail lease will “commence” either —

When you take possession of the keys to the shop premises; or

When you commence paying rent; or

When both parties sign the lease.

You should get independent advice before doing any of those things.

Experts in the fields of legal, financial, business, taxation and property matters will be able to help you make the decision to enter into a lease or an agreement to lease and the terms of the contract that should be negotiated.

For legal advice, you should consult a solicitor with experience in commercial property and preferably in retail shop leasing matters.

Industry advice is also available from experts in accounting and valuation as well as retail representative groups and tenant advocates. The Western Australian Government’s Small Business Development Corporation (SBDC) is also a source of guidance to prospective tenants.

You should understand the terms of the lease before signing it.

All elements in a lease agreement e.g. rent, term, options, outgoings and related costs such as documenting the lease need to be understood by you. These matters are open to negotiation with the Lessor but the basis of your agreement is subject to the provisions of the Act.

DISCLOSURE STATEMENT (s.6)

The Lessor must provide you with a “*Disclosure Statement*” before you enter a new retail shop lease.

You can terminate the lease at any time up to 60 days after the lease was “entered into” —

- ◆ if the *Disclosure Statement* is not given to you at least 7 days before the lease is “entered into”; or
- ◆ if the *Disclosure Statement* contains false or misleading information.

You can go to the State Administrative Tribunal and get an order for compensation for any pecuniary loss suffered as a result of —

- ◆ not being given a *Disclosure Statement*; or
- ◆ false or misleading information contained in a *Disclosure Statement*.

The *Disclosure Statement* is to be in a prescribed form (Regulation 4 Form 1) and is to contain all oral and written agreements and representations made by the Lessor or through his/her agent(s) in negotiations together with relevant information including but not limited to:—

- ◆ details of the Lessor’s property such as the total lettable area, tenancy mix and lettings, support services and management practices;
- ◆ details of the shop premises location, area and services together with the terms and conditions of the commercial tenancy such as asking rent, period of lease plus any options to extend the agreement and rent review periods and basis for the review;
- ◆ contributions to the landlord’s expenses (operating expenses); - the Lessor’s interest in the shopping centre or building; and - any additional charges payable by the Lessee such as shop fitout or contributions to marketing and sinking funds.

In turn, the Lessor may ask for details of your retailing experience and of your financial capacity to establish and trade profitably and professionally. This may involve you presenting a satisfactory business plan to the Lessor.

If you require any special fitout or services for your tenancy, you will certainly need to formally disclose these to the Lessor along with any other evidence to support your case.

The Lessor doesn’t have to lease the shop premises if it appears that a business will not add value to the property investment. Your disclosure, like the Lessor’s, must be correct and contain no misleading information. Otherwise,

the Lessor could institute legal proceedings against you outside the provisions of the Act.

You should understand the “*Disclosure Statement*” before signing it.

In signing the *Disclosure Statement* you are acknowledging you understand the basis for the retail lease with the Lessor. It is vital that you satisfy yourself, through prior enquiry, particularly taking appropriate legal and expert advice on all relevant information regarding the retail shop and (where applicable) the shopping centre building and property.

TENANT GUIDE (s.6A)

A new retail shop lease must include this “*Tenant Guide*” at the front of the lease.

You can terminate the lease at any time up to 60 days after the lease was “entered into” if there was no “*Tenant Guide*” provided with the lease.

You can go to the State Administrative Tribunal and get an order for compensation for any pecuniary loss suffered as a result of not being given a “*Tenant Guide*”.

PREMISES COVERED BY THE ACT (s.3)

Generally

- The Act covers a retail shop where the premises are being used wholly or predominantly for a business involving the sale of goods by retail. However other premises trading in a retail shopping centre (where there are 5 or more retail shops) are also covered by the Act.
- The Act and its requirements only apply to retail shop leases when the shops have a retail floor area that does not exceed 1 000m².

A prospective retail tenant should establish the area under the lease and have this surveyed (if none is available) as early as possible in the agreement – especially in preparation for a net rent lease.

Specifically

Certain types of specified business are also covered including drycleaning, hairdressing, beauty therapy, shoe repair and video stores and some petrol station agreements.

If you are not sure whether your business is covered by the Act, get advice.

TERM OF THE RETAIL SHOP LEASE (s.13)

Minimum of 5 years

If you are entering a new retail shop lease for the first time, the Act provides you with a right to a minimum of a 5 year lease to help you establish and develop your business. This can be a combination of term and options to extend your lease to the 5 year period (Regulation 6 Form 3).

Can be longer... or shorter

The tenure you negotiate can be greater than 5 years. Under some circumstances, you can also agree with the Lessor to a term shorter than 5 years but this must be your decision. (The approval of the State Administrative Tribunal should be sought in these circumstances). It would be prudent to take expert advice on the implications for your business if you do not take up the Act's 5 years' tenancy right.

Fixed period

A lease is for a fixed period.

At the end of the lease...

At the end of the current term and your use of any options, the Lessor does not have to renew the agreement and the Lessee has no further rights to occupy the premises. All outstanding obligations under the lease should have been satisfied at this time. After the expiry of the lease agreement your continued occupancy of the premises will be at the Lessor's sole discretion. This interim period may be on a month to month basis.

Options in the lease

It is in your commercial interests to ensure that any options you hold to extend your occupancy are recorded by you allowing a sufficient lead time to exercise

the option by the date set out in the terms of the lease. That option will lapse unless you inform the Lessor that you wish to renew your lease (exercising your option) in the manner and timeframe as set out in the lease document.

STRUCTURING YOUR LEASE

Assume you won't be able to renew

You should not rely on a new lease being entered into at the end of the lease period.

Therefore you should:

- ◆ Base your cashflows on the assumption that the lease will probably not be renewed.
- ◆ Adopt a prudent business practice, which amortises the costs of your business, and the cost of the goodwill, if you purchased the business, over the period of the lease.
- ◆ Recognise the worth or value of the goodwill of your retail business is directly related to the tenure you hold. The balance of the current lease term and any options are prime factors that the market will assess in determining the goodwill attached to your business.
- ◆ Decide on the level of profit that you expect to achieve over the period of the lease.

Does the lease include redevelopment or relocation clauses?

Commercial and retail property investments need to be constantly promoted. This can involve redevelopment of premises with works by the Lessor that can significantly impact on your retail business. To safeguard your interests you will need to carefully consider any redevelopment or relocation clause in the proposed lease. If you agree to such a clause you should negotiate to ensure that your retail business will not be in any worse situation as a result of the Lessor's capital works initiatives. This clause could provide you with a commitment from the Lessor for a new shop in the redevelopment. This could also provide for a new location and rental levels comparable with your current position.

Compensation issues also need to be specified in cases where your trade will be affected due to a less favourable shop location or higher rental structure or no new shop can be provided for your business.

Can the Act help?

The Act empowers the State Administrative Tribunal to consider special circumstances in approving redevelopment and relocation applications by the Lessor. The interests of both Lessee and Lessor are considered in these cases but may not meet all your requirements that you could have negotiated earlier in establishing the lease terms and conditions.

RENT REVIEW (s.11)

Only use one method of review at a time

If you have agreed to a review of your shop rental, then at each review time a single basis of rent review is to apply. For example, this single basis to be specified in the *Disclosure Statement* (Regulation 4 Form 1) can include, but is not limited to:

- ◆ Market Rent.
- ◆ Consumer Price Index (CPI).
- ◆ Percentage increase.
- ◆ An agreed formula or combination, eg. CPI + 10%.

The lease, however, cannot give the Lessor the right to choose the greatest return from a range of rent types at any one review.

Can use a different method next time

The types of review may vary over the life of the lease, for example Year 1 CPI, Year 2 Market rent, Year 3 a fixed increase then a higher rate if turnover exceeds an agreed level, Year 4 Market rent, Year 5 CPI + a percentage increase.

No “ratchet” clauses

In a rent review your rent can not be held above the current market level (via a ratchet clause) such that the rent can never fall or go below a fixed level. The

lease must allow your rent to rise or fall to a level supported by market evidence.

The role of the Act and the State Administrative Tribunal

In a market rent review, the Act provides that both parties can:

- (i) initiate the market rent review process,
- (ii) appoint a single licensed valuer to determine the new rental, or
- (iii) each appoint a valuer to represent their interests.

In the case of disagreement the new rent may be referred to the State Administrative Tribunal for determination.

Until both parties agree to the new rent level or the Tribunal determines the new rent, the current rent will continue to apply. Once the higher or lower rent is agreed, adjustments will be backdated to the review date. The rate of repayment between the parties can be varied at the Tribunal's discretion if the Tribunal has determined the rent.

RENT BASED ON TURNOVER (s.7 & s.8)

Steps needed to base the rent on turnover

The Act provides that if you have agreed to a rent based on the turnover of your business then that agreement must be based on an agreed formula and must be formalised in writing on a prescribed form (Regulation 5 Form 2).

The Act also recognises the confidentiality of such figures to a retail business and limits the release and use of this information strictly in accordance with your agreement with the Lessor.

CONTRIBUTION TO LANDLORD EXPENSES (s.12)

Only “operating” expenses not “capital” expenses

The landlord's expenses are described in the Act as operating expenses. Leases can also refer to them as “outgoings or variable outgoings”. They are costs in operating, repairing, or maintaining the Lessor's premises including any building common areas. Typically these costs are the rates and taxes, cleaning, airconditioning, security, insurances and other valid expenses of running the

property. No capital expenditures (eg asset replacement) are recoverable operating expenses.

Operating expenses and their payment are to be set out in the *Disclosure Statement* (Regulation 4 Form 1) and the budget attached to the lease provided by the Lessor.

You can not be asked to pay management fees — these are costs to the Lessor that are not recoverable from retail tenants.

Contributions are negotiable, but not to exceed your “relevant proportion”

Your contributions to landlord expenses are negotiable. Whilst you may agree to a different form of contribution, the Act provides that the upper limit of the operating expenses that you can be reasonably asked to contribute to is your relevant proportion.

This share at the start of the accounting year is represented by the area of your shop’s retail floor area in relation to the total lettable area of the shopping centre or cluster of shops.

i.e.:
$$\frac{\text{retail floor area in shop}}{\text{total lettable area}} = \text{relevant proportion}$$

The State Administrative Tribunal can decide on any disagreements in these matters and in certain circumstances can vary the relevant proportion during the year.

Other expenses directly attributable to your business (called “referable” expenses) for example, specialised cleaning incurred by only a few tenants, are subject to the relevant proportion limit of the shops incurring those costs.

NOTE: Rental agreements are generally —

- ◆ on a “net” basis (rent plus a contribution to operating expenses); or
- ◆ on a “gross” basis (an all inclusive payment for all your shop occupancy costs); or
- ◆ another similar version.

You should seek expert advice as to the basis that best suits your business operations.

Audit and accounting standards – Lessors obligations

The Lessor is obliged to comply with audit and accounting standards and timetables for preparing budgets, providing end of financial year expenditure statements and distributing audit costs particularly on net rental agreements.

Lessor to provide estimates and statements

In “net” lease arrangements, the Act provides that you will not have to pay a contribution to the Lessor’s operating expenses until one month after the Lessor provides you with an annual estimate of expenditure for each operating expense.

The Lessor is also required to supply you with an audited operating expenses statement within 3 months after the previous accounting period has ended. If this is not done you do not have to contribute to the Lessor’s operating expenses until you have received the audited statement.

SINKING FUNDS (s.12A)

Act protects your contributions

If your retail 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 moneys are subject to accounting and audit provisions with no funds being able to be expended on capital works. These are the rightful responsibility of the Lessor and would include the construction of new extensions and the replacement of major plant and equipment.

OTHER FUNDS AND RESERVES (s.12B)

Other contributions are also protected

The Act also extends protection to any other funds and reserves that you agree to contribute to for specific or marketing or promotion purposes. Again the Lessor is required to properly account for the collection administration, expenditure and auditing of these funds.

HOURS OF OPERATION (s.12C)

Your opening hours are flexible

A provision in a retail shop lease which requires you to open your premises at specified hours or times is invalid (void) under the Act.

As you have the discretion to open (or close) your business at times of your choice the Lessor can not refuse to renew your lease because of your actions. If in the future you believe this to be the reason that your lease was not renewed you may apply in writing to the State Administrative Tribunal for compensation.

STANDARD TRADING HOURS AND THE COSTS OF OPERATION

Your retail business will be responsible for a share (limited to the “relevant proportion”) of agreed operating expenses arising from trading within standard trading hours.

NOTE: “Standard Trading Hours” are prescribed as —

- (a) 8.00 a.m. to 6.00 p.m. Monday, Tuesday, Wednesday and Friday;
- (b) 8.00 a.m. to 9.00 p.m. Thursday; and
- (c) 8.00 a.m. to 5.00 p.m. Saturday.

(see regulation 5A.)

If your retail shop is enclosed in a shopping centre then for practical reasons the opening and closing times (core hours) for the centre may be less than the standard trading hours. These matters will need to be clarified in disclosure by the Lessor.

If you do not open outside standard trading hours, you can not be required to make a contribution to the expenses related to the extended hours.

If you open outside the standard trading hours, you will be charged a contribution to the expenses related to the extended hours. These are referable expenses and are limited to the relevant proportion of those shops which open during the extended hours.

ASSIGNMENT AND SUB-LEASING (s.10)

Your responsibilities if you sell or sub-lease your business

If you choose to sell your business during the term of your lease, you (as the Assignor) and any guarantor to your lease can not be held liable for the

performance of the ingoing tenant (the Assignee) or for any moneys including any rent owed by the ingoing tenant from the assignment date.

The Lessor can not withhold consent to an assignment, except on reasonable grounds. The Lessor may however recoup reasonable expenses in investigating the proposed assignee for your lease.

You are entitled to assume the Lessor's approval to the assignment if you have not received a reply within 28 days after seeking that approval in writing.

If you choose to sub-lease part of your premises you will be required to seek the Lessors approval and also provide a *Tenant Guide* and *Disclosure Statement* to your Lessee. The sub-lease will not exclude you from your existing liabilities to the Lessor.

VOID CLAUSES (s.15)

Lease provisions and other oral and written agreements cannot include clauses that are contrary to any provision in the Act.

In addition, the lease or other side agreements or oral agreements can not —

- ◆ require you to pay key money (s.9), which is any moneys or other benefits in addition to rent paid to the Lessor or others for the right to lease retail shop premises.
- ◆ require you to disclose your turnover figures to the Lessor unless you agree on turnover as a basis for your rent assessment (s.7) and have completed Regulation 5 Form 2;
- ◆ prevent you from choosing to disclose the rent you have agreed to third parties (s.11) such as other retail tenants or their Valuers; or
- ◆ require you to contribute to any fund that applies those moneys to capital expenditures (s.12) such as new building works in shopping centres.

Some clauses may appear to create or limit aspects of the lease in an unfair or “unfriendly” way. If you are uncomfortable with the effect of any clauses in the lease, seek expert advice.

COMPENSATION BY LANDLORD (s.14)

The Act provides that, for shopping centre properties, the Lessor can not adversely affect your retail business trading in a retail shopping centre through action or inaction in:

- ◆ inhibiting your access and that of customers to your shop premises;
- ◆ disrupting trading conditions causing loss of profits to your business; or
- ◆ not properly repairing, maintaining or cleaning the shopping centre premises or common areas.

You should keep in mind the type and quality of services provided by the Lessor in relation to your contributions and those of all tenants in the centre. A Merchants Association can assist in coordinating the interests of all retail tenants to ensure the quality of management, cleaning and other property services support your retail businesses.

Only after your written request and a reasonable time has been given to the Lessor to correct the problems should you take your grievance to the State Administrative Tribunal. To support a claim, you need to demonstrate to the Tribunal that your business sales, gross profits, expenses and net profits have been adversely affected by the Lessor.

DISPUTES BETWEEN THE LESSEE (TENANT) AND LESSOR (LANDLORD)

The Act may be able to help...

If you cannot resolve a dispute over any aspect of your retail shop lease with the Lessor or through the Lessors property agents, the Act authorises the State Administrative Tribunal to deal with these disputes as “a question arising”. Either the lessee or the lessor may initiate this action with the Tribunal by making an application to the Tribunal and paying the appropriate fee. A matter or question may be dealt with through a compulsory conference or mediation process under the *State Administrative Tribunal Act 2004*.

Advice in such matters can be obtained from solicitors with property experience, the SBDC, industry sources, tenant advocates and retail representative groups.

To avoid disputes, get everything in writing

To reduce the possibility of a dispute, before entering a lease you should obtain confirmation in writing of any oral representations made during the negotiations. These representations should be included in the *Disclosure Statement* and might include:

- ◆ customer traffic numbers;
- ◆ exclusive rights to sell product lines;
- ◆ other tenancies as competitors;
- ◆ the existence and continuance of major tenants in the centre, and
- ◆ marketing support by the Lessor and related costs.

[Form 6 inserted in Gazette 18 Jun 1999 p. 2611-26; amended in Gazette 30 Dec 2004 p. 6907-9.]

Notes

- ¹ This ~~reprint~~ is a compilation ~~as at 10 July 2009~~ of the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Citation	Gazettal	Commencement
<i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i>	30 Aug 1985 p. 3121-7	1 Sep 1985 (see r. 2 and <i>Gazette</i> 30 Aug 1985 p. 3065)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 1991</i>	3 May 1991 p. 1954	3 May 1991
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 1992</i>	16 Feb 1993 p. 1269-79	16 Feb 1993
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 1999</i>	18 Jun 1999 p. 2599-626	1 Jul 1999 (see r. 2)
Reprint of the <i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i> as at 24 Nov 2000 (includes amendments listed above)		
<i>Corporations (Consequential Amendments) Regulations 2001 Pt. 4</i>	28 Sep 2001 p. 5353-8	15 Jul 2001 (see r. 2 and <i>Cwlth Gazette</i> 13 Jul 2001 No. S285)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 2004</i>	30 Dec 2004 p. 6907-9	1 Jan 2005 (see r. 2 and <i>Gazette</i> 31 Dec 2004 p. 7130)
Reprint 2: The <i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i> as at 10 Jul 2009 (includes amendments listed above)		
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 2012</i>	23 Mar 2012 p. 1364-6	r. 1 and 2: 23 Mar 2012 (see r. 2(a)); Regulations other than r. 1 and 2: 24 Mar 2012 (see r. 2(b) and Gazette 23 Mar 2012 p. 1363)