



Western Australia

## **Commercial Tenancy (Retail Shops) Agreements Regulations 1985**

Compare between:

[24 Mar 2012, 02-b0-02] and [30 Nov 2012, 02-c0-02]



## **Commercial Tenancy (Retail Shops) Agreements Regulations 1985**

### **1. Citation**

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

### **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*<sup>1</sup>.

### **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 —

- (a) drycleaning;
- (b) hairdressing;

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- (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**

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

<b>Item</b>	<b>Section of the Act</b>	<b>Description of matter</b>
		that is before the expiry of the term that may be obtained by a tenant under section 13(1) of the Act
6.	13(7b)	Application for an order that an option of renewal does not arise under section 13(1) of the Act
7.	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

*[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**



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

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**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

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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 000m<sup>2</sup>.

**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.

<p><b>If you are not sure whether your business is covered by the Act, get advice.</b></p>
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## **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

- <sup>1</sup> This is a compilation 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 [1a](#). 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)
<b>Reprint of the <i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i> as at 24 Nov 2000</b> (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)
<b>Reprint 2: The <i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i> as at 10 Jul 2009</b> (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 <i>Gazette</i> 23 Mar 2012 p. 1363)

<sup>1a</sup> [On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.](#)

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**Provisions that have not come into operation**

<b><u>Citation</u></b>	<b><u>Gazettal</u></b>	<b><u>Commencement</u></b>
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations (No. 2) 2012</i> r. 3-16 <sup>2</sup>	30 Nov 2012 p. 5831-901	1 Jan 2013 (see r. 2(b) and <i>Gazette</i> 30 Nov 2012 p. 5773)

<sup>2</sup> On the date as at which this compilation was prepared, the *Commercial Tenancy (Retail Shops) Agreements Amendment Regulations (No. 2) 2012* r. 3-16 had not come into operation. They read as follows:

**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**

**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.
- (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;
  - (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.

**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 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.

**13. Regulation 10 amended**

In regulation 10 delete the Table and insert:

**Table**

<b><u>Item</u></b>	<b><u>Section of Act</u></b>	<b><u>Description of matter</u></b>
<u>1.</u>	<u>11(3C)(b)</u>	<u>Application for an order that a landlord comply with a request made under section 11(3B) of the Act.</u>
<u>2.</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>3.</u>	<u>12(1e)</u>	<u>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.</u>
<u>4.</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>5.</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>6.</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>7.</u>	<u>13(7)</u>	<u>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.</u>

<u>Item</u>	<u>Section of Act</u>	<u>Description of matter</u>
<u>8.</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>9.</u>	<u>13A(3)</u>	<u>Application to determine that there are bona fide commercial reasons for an inconsistency referred to in section 13A(1)(a) of the Act.</u>
<u>10.</u>	<u>14A(3)</u>	<u>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.</u>
<u>11.</u>	<u>15F(6)</u>	<u>Application for an interim order pending final determination of an unconscionable conduct application under section 15F(1) of the Act.</u>
<u>12.</u>	<u>16D(6)</u>	<u>Application for an interim order pending final determination of a misleading or deceptive conduct application under section 16D(1) of the Act.</u>
<u>13.</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>
<u>14.</u>	<u>27(3)(b)</u>	<u>Application for a matter before the Tribunal to be transferred to a court.</u>

**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.
- (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**

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

<u>Commencement day falls during this period</u>	<u>Notice required to be given by landlord during this period</u>
<u>than 12 months before the option expiry day for a retail shop lease</u>	<u>before the day that is 3 months before the option expiry day for the retail shop lease</u>

**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 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

(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**

[r. 7]

**Item and description**

**Provision for retail shop lease**

<u>1. <i>Entitlement by landlord to determine the lease</i></u> <u>Section 13(6)(da) of the Act</u>	<u>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 —</u> <u>(a) the tenant;</u> <u>(b) a guarantor of the tenant, if —</u> <u>(i) the tenant is a body corporate; and</u> <u>(ii) the guarantor is a director or a majority shareholder of the body corporate.</u>
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2. Relocation

Section 14A(1)(a)  
of the Act

1.1. Terms used in this clause

In this clause, unless the contrary  
intention appears —

*landlord* means the person who is the  
landlord, as defined in the *Commercial  
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;

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.

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 *termination date*);

(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 *offer*) to lease to the tenant —

(a) the redeveloped retail shop; or

(b) an alternative retail shop.

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 —

(a) be located in a position that has an estimated trading potential similar to that of the retail shop; and

- (b) have a floor configuration similar to that of the retail shop; and
- (c) have a lettable area similar to the lettable area of retail shop; and
- (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.

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.

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

(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

(c) the lease is to make provision to the following effect —

(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;

(ii) the landlord has no claim against a tenant for the termination of the lease in the circumstances set out in subparagraph (i);

(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.

1.5.10 The landlord is responsible for arranging the preparation of the substitute lease and the landlord is to bear the following costs —

(a) the cost of, and associated with, the preparation, and execution, of the substitute lease and any deed of surrender of this lease;

(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 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 —

(a) costs incurred by the tenant in dismantling fittings, equipment or services; and

(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 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 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.

## **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.

### **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*.

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### **16. Schedule amended**

(1) In the Schedule delete:

Schedule  
Forms

\_\_\_\_\_ 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)

[r. 4]

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
- Part 13 Tenant acknowledgments and signing
- Part 14 Attachments

<u>Landlord</u>	
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<u>Tenant</u>	
<u>Premises</u>	
<b><u>KEY DISCLOSURE ITEMS</u></b>	
<b><u>1 Annual base rent under the lease</u></b> See item 10.1	\$ p.a. <u>Including GST/Excluding GST</u>
<b><u>2 Is rent based on turnover payable by the tenant in year 1</u></b> See item 12	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u>
<b><u>3 Total estimated outgoings/operating expenses, promotion and marketing costs and contributions to sinking fund for the tenant in year 1</u></b> See Item 14.2 and Part 6	\$ <u>Including GST/Excluding GST</u>
<b><u>4 Term of the lease</u></b> See item 5.2	<u>      </u> Years <u>      </u> months
<b><u>5 Commencement date is</u></b> See item 5.1	<u>   </u> / <u>   </u> /20 <u>Actual/estimated</u> <i>[Insert the commencement date, or details of how the commencement date is to be determined, e.g. on receipt of council approval]</i>
<b><u>6 Handover date is</u></b> See item 7.1	<u>   </u> / <u>   </u> /20 <u>Actual/estimated</u> <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><b><u>7</u></b> 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><b><u>8</u></b> 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
<b><u>PART 1 — PREMISES</u></b>	
<b><u>1 Premises details</u></b>	
<p><u>1.1</u> 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><u>1.2</u> 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>

<u>Disclosure item</u>	<u>Response</u>
<p><u>1.3 Lettable area of the premises (in m<sup>2</sup>)</u></p>	<p><u>New premises - approximately</u>  <u>_____ m<sup>2</sup></u></p> <p><u>Existing premises — certified</u>  <u>at</u>  <u>_____ m<sup>2</sup></u></p> <p><u>Will a survey be conducted?</u></p> <p><input type="checkbox"/> <u>Yes</u></p> <p><input type="checkbox"/> <u>No</u></p>
<p><u>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)</u></p>	<p><u>[Select as appropriate]</u></p> <p><input type="checkbox"/> <u>air conditioning</u></p> <p><input type="checkbox"/> <u>plastered walls</u></p> <p><input type="checkbox"/> <u>cool room/freezer</u></p> <p><input type="checkbox"/> <u>shop front</u></p> <p><input type="checkbox"/> <u>floor coverings</u></p> <p><input type="checkbox"/> <u>sink</u></p> <p><input type="checkbox"/> <u>grease trap</u></p> <p><input type="checkbox"/> <u>sprinklers</u></p> <p><input type="checkbox"/> <u>hot water service</u></p> <p><input type="checkbox"/> <u>suspended ceilings</u></p> <p><input type="checkbox"/> <u>lighting</u></p> <p><input type="checkbox"/> <u>telephone</u></p> <p><input type="checkbox"/> <u>mechanical exhaust</u></p> <p><input type="checkbox"/> <u>water supply</u></p> <p><input type="checkbox"/> <u>painted walls</u></p> <p><input type="checkbox"/> <u>waste</u></p>

Disclosure item	Response
	<input type="checkbox"/> <a href="#">electrical distribution load (3 phase)</a> <input type="checkbox"/> <a href="#">electrical distribution load (single phase)</a> <input type="checkbox"/> <a href="#">separate utility meter — gas</a> <input type="checkbox"/> <a href="#">separate utility meter — water</a> <input type="checkbox"/> <a href="#">separate utility meter — electricity</a> <input type="checkbox"/> <a href="#">other [Please specify]</a>
<p><a href="#">1.5 Services and facilities provided by the landlord for the benefit of the premises</a></p>	<p><i>[Select as appropriate]</i></p> <input type="checkbox"/> <a href="#">tenancy cleaning</a> <input type="checkbox"/> <a href="#">common area cleaning</a> <input type="checkbox"/> <a href="#">common area lighting</a> <input type="checkbox"/> <a href="#">security services</a> <input type="checkbox"/> <a href="#">bin rooms</a> <input type="checkbox"/> <a href="#">child minding facilities</a> <input type="checkbox"/> <a href="#">staff toilets</a> <input type="checkbox"/> <a href="#">other [please specify]</a> <p><i>[Note: The tenant should ensure that the nature of the services and facilities are suitable to the tenant's requirements]</i></p>
<p><a href="#">1.6 Other special requirements of the tenant in relation to the premises</a></p>	<input type="checkbox"/> <a href="#">air control</a> <input type="checkbox"/> <a href="#">delivery access</a> <input type="checkbox"/> <a href="#">drainage</a> <input type="checkbox"/> <a href="#">floor loading</a> <input type="checkbox"/> <a href="#">wall loading</a> <input type="checkbox"/> <a href="#">other [please specify]</a>

<u>Disclosure item</u>	<u>Response</u>
<b>2 Permitted use</b>	
<u>2.1 Description of permitted use</u>	<i>[Note: the tenant should investigate if the proposed use of the premises is permitted under planning laws]</i>
<u>2.2 Is the permitted use described in item 2.1 exclusive to the tenant?</u>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<u>2.3 Is there any restriction on the provision of any goods and services by the tenant?</u>	<input type="checkbox"/> Yes <i>[insert details]</i> <input type="checkbox"/> No
<u>2.4 Do the premises meet all requirements of current health, safety, building and fire legislation for the permitted use?</u>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not known
<b>3 Number of car parking spaces</b>	
<u>3.1 Approximate total spaces</u>	<u>spaces</u>
<u>3.2 Available spaces for customers of the building/centre</u>	<u>spaces</u>
<u>3.3 Reserved spaces for use of the tenant only</u>	<u>spaces</u>
<b>4 Head lease</b>	
<u>4.1 Is the premises under a head lease or Crown lease?</u>	<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>

<u>Disclosure item</u>	<u>Response</u>
4.2 <u>If this is a Crown lease, is the Minister's consent to the lease required?</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u> <input type="checkbox"/> <u>Not applicable</u>
4.3 <u>Has the landlord provided a copy of the head lease or Crown lease to the tenant?</u>	<input type="checkbox"/> <u>Yes – attached at item 38.2</u> <input type="checkbox"/> <u>No</u> <input type="checkbox"/> <u>Not applicable</u>
4.4 <u>Current term under the head lease or Crown lease and option/s to renew</u>	<input type="checkbox"/> <u>Not applicable</u> <input type="checkbox"/> <u>Details of head lease as follows:</u> <u>Current term:</u> <u>Years: / /20 to / /20</u> <u>Options to renew:</u> <u>Years: / /20 to / /20</u> <u>[List any options for further terms held by the landlord under the head lease]</u>
4.5 <u>Is the head landlord's consent to the lease required?</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u>
4.6 <u>Do any rights or obligations of the landlord under the head lease affect the premises?</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u> <u>[Insert details]</u>
<b><u>PART 2 — TERM OF LEASE AND OPTION/S TO RENEW LEASE</u></b>	
<b><u>5 Term of lease</u></b>	

<u>Disclosure item</u>	<u>Response</u>															
5.1 <u>Date lease commences (see also date of handover at item 7)</u>	<u> / /20</u> <u>Actual / Estimate</u>  <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 <u>Length of term</u>	<u> Years      months</u>															
5.3 <u>Date lease expires (based on the date indicated at item 5.1 as the date the lease commences)</u>	<u> / /20</u>															
<b><u>6 Option/s to renew lease</u></b>																
6.1 <u>Option/s details</u>	<input type="checkbox"/> <u>Not applicable</u>															
	<input type="checkbox"/> <u>Options as follows:</u>															
	<table border="1"> <thead> <tr> <th style="text-align: left;"><u>Length of option</u></th> <th style="text-align: left;"><u>Period of option</u></th> <th style="text-align: left;"><u>Exercise date</u></th> </tr> </thead> <tbody> <tr> <td><u> years</u></td> <td><u> / /20</u> <u>to</u> <u> / /20</u></td> <td><u> / /20</u> <u>to</u> <u> / /20</u></td> </tr> <tr> <td></td> <td><u>Actual/</u> <u>Estimate</u></td> <td><u>Actual/</u> <u>Estimate</u></td> </tr> <tr> <td><u> years</u></td> <td><u> / /20</u> <u>to</u> <u> / /20</u></td> <td><u> / /20</u> <u>to</u> <u> / /20</u></td> </tr> <tr> <td></td> <td><u>Actual/</u> <u>Estimate</u></td> <td><u>Actual/</u> <u>Estimate</u></td> </tr> </tbody> </table>	<u>Length of option</u>	<u>Period of option</u>	<u>Exercise date</u>	<u> years</u>	<u> / /20</u> <u>to</u> <u> / /20</u>	<u> / /20</u> <u>to</u> <u> / /20</u>		<u>Actual/</u> <u>Estimate</u>	<u>Actual/</u> <u>Estimate</u>	<u> years</u>	<u> / /20</u> <u>to</u> <u> / /20</u>	<u> / /20</u> <u>to</u> <u> / /20</u>		<u>Actual/</u> <u>Estimate</u>	<u>Actual/</u> <u>Estimate</u>
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	<u>Actual/</u> <u>Estimate</u>	<u>Actual/</u> <u>Estimate</u>														
<u> years</u>	<u> / /20</u> <u>to</u> <u> / /20</u>	<u> / /20</u> <u>to</u> <u> / /20</u>														
	<u>Actual/</u> <u>Estimate</u>	<u>Actual/</u> <u>Estimate</u>														
<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]</i>															

<b>Disclosure item</b>	<b>Response</b>
	<p data-bbox="847 371 1193 461"><i>and given to the landlord on or before the last day stated in the option clause of the lease.</i></p> <p data-bbox="847 479 1214 512"><b>How option is to be exercised</b></p> <p data-bbox="847 530 1235 663"><i>[Describe the method by which the tenant must exercise the option to renew the lease, e.g. in writing, orally]</i></p>
<b><u>PART 3 — WORKS, FITOUT AND REFURBISHMENT</u></b>	
<b><u>7 Date of handover</u></b>	
<p data-bbox="389 786 820 983"><u>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)</u></p>	<p data-bbox="847 786 1078 851"><u>/ /20</u> <u>Actual / Estimate</u></p> <p data-bbox="847 869 1235 1001"><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>
<b><u>8 Landlord's works</u></b>	



Disclosure item	Response
<p><u>8.1</u> 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)</p>	
<p><u>8.2</u> Is the tenant required to contribute towards the cost of any of the landlord's finishes, fixtures, fittings, equipment, or services?</p>	<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>
<p><u>8.3</u> Estimate of expected contribution by the tenant towards the costs of the landlord's works</p>	<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>
<p><b><u>9</u> Tenant's fitout works</b></p>	
<p><u>9.1</u> Fitout works to be carried out by the tenant (excluding the landlord's works at item 8)</p>	
<p><u>9.2</u> Is the landlord providing any contribution towards the cost of the tenant's fitout?</p>	<p><input type="checkbox"/> Yes — <i>[insert details of landlord's contribution, including any amortisation arrangements]</i></p> <p><input type="checkbox"/> No</p>

<b>Disclosure item</b>	<b>Response</b>
9.3 <u>Does the landlord have requirements as to the quality and standard of shop front and fitout?</u>	<input type="checkbox"/> <u>Yes</u> <i>[Insert details or provide fitout guide]</i> <input type="checkbox"/> <u>No</u>
9.4 <u>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?</u>	<input type="checkbox"/> <u>Yes</u> <i>[Insert details of nature, extent and timing of the refurbishment or refitting requirements]</i> <input type="checkbox"/> <u>No</u>
<b>PART 4 — RENT</b>	
<b>10 Annual base rent</b>	
10.1 <u>Starting annual base rent (i.e. when the lease commences)</u>	\$ <u>Including/Excluding GST</u>
10.2 <u>Rent free period</u>	<i>[Describe any rent free period]</i>
10.3 <u>Date of rent commencement</u>	<u>/ /20</u>
10.4 <u>How rent payments are to be made?</u>	<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 <u>Is there provision for abatement of rent on damage or destruction of the premises?</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u> <i>See lease clause: [Insert details]</i>
<b>11 Rent adjustment (rent review)</b>	

<b>Disclosure item</b>	<b>Response</b>
<p><u>11.1 Rent adjustment date/s and adjustment method</u></p>	<p><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></p>
<p><b>12 Rent based on turnover</b></p>	
<p><u>12.1 Is rent based on turnover payable by the tenant?</u></p>	<p><input type="checkbox"/> Yes — <i>[Insert method of calculation for turnover rent]</i></p> <p><input type="checkbox"/> No</p> <p><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></p> <p><b><i><u>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).</u></i></b></p> <p><i>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]</i></p>
<p><b>PART 5 — OUTGOINGS/OPERATING EXPENSES</b></p>	

<u>Disclosure item</u>	<u>Response</u>
<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>	
<b>13 Contribution by tenant towards the landlord's outgoings/operating expenses</b>	
13.1 <u>Is the tenant required to pay or contribute towards the landlord's outgoings/operating expenses?</u>	<input type="checkbox"/> Yes <input type="checkbox"/> No
13.2 <u>Describe any period during which the tenant is not required to pay any outgoings/operating expenses</u>	
13.3 <u>Date on which payment of outgoings/operating expenses is to commence</u>	<u>/ /20</u>
13.4 <u>Frequency of operating expenses payments</u>	<i>[Insert details of when payments are due]</i>
13.5 <u>Formulae for apportioning outgoings/operating expenses</u>	<i>[Insert formulae of how the outgoings payable by the tenant are to be apportioned]</i> See lease clauses: <i>[Insert details]</i> <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>

Disclosure item	Response
<p><u>13.6 Proportion of total operating expenses apportioned to the tenant (if applicable) as at the date of lease commencement</u></p>	<p><i>[Note: The proportion of the total cost of operating expenses for the building/centre payable by the tenant may vary periodically]</i></p>
<p><b><u>14 Outgoings/operating expenses estimates (annual) for the 12 month period to</u></b></p>	
<p><u>For a list of operating expenses payable by the tenant see the annual estimate of expenditure attached and the following lease clauses:</u>  <i>[Insert details]</i>  <u>[Attach a copy of the annual estimate of expenditure at item 38.3]</u></p>	
<p><u>14.1 Total outgoings/operating expenses for the building/centre</u></p>	<p>\$</p>
<p><u>14.2 Estimated tenant contribution to outgoings/operating expenses</u></p>	<p>\$</p>

<u>Disclosure item</u>	<u>Response</u>
<b><u>PART 6 — OTHER COSTS</u></b>	
<b><u>15 Advertising and promotional costs</u></b>	
<u>15.1 Is the tenant required to contribute towards advertising and promotional costs (including marketing fund contributions) for the building/centre?</u>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<u>15.2 Tenant's contribution to advertising and promotional costs per annum</u>	<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>
<u>15.3 Landlord's contribution to advertising and promotional costs per annum</u>	
<u>15.4 Does the tenant have any input into how the marketing and promotional fund is used?</u>	<i>[Insert details as to how tenant can have input]</i>

Disclosure item	Response
<b>16 Sinking fund for repairs and maintenance</b>	
16.1 <u>Is the tenant required to contribute towards a sinking fund for repairs or maintenance for the building/centre?</u>	<input type="checkbox"/> Yes <input type="checkbox"/> No
16.2 <u>Tenant's contribution to sinking fund for repairs or maintenance per annum</u>	<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>
<b>17 Other monetary obligations and charges</b>	
17.1 <u>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</u>	<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>

<u>Disclosure item</u>	<u>Response</u>
<u>17.2 Compulsory contributory membership of Tenants' Association</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u> <u>Date on which contributions to commence:</u>
<b><u>PART 7 — ALTERATION WORKS (INCLUDING RENOVATIONS, EXTENSIONS, REDEVELOPMENT, DEMOLITION)</u></b>	
<b><u>18 Alteration works</u></b>	
<u>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?</u>	<input type="checkbox"/> <u>Yes — [Insert details of the proposed works]</u> <input type="checkbox"/> <u>No</u>
<b><u>19 Orders of statutory or local authorities</u></b>	
<u>19.1 Are there any outstanding orders of a statutory authority or a local government affecting the premises?</u>	<u>[Select one of the following and provide details]</u> <input type="checkbox"/> <u>Yes — [Insert details]</u> <input type="checkbox"/> <u>No</u>
	<u>[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.]</u>
<b><u>20 Clause/s in lease dealing with relocation, demolition and destruction</u></b>	



<b>Disclosure item</b>	<b>Response</b>
20.1 <u>Clause/s in lease providing for relocation of the tenants</u>	<u>Clause/s _____ of the lease /</u> <u>Not applicable</u>
20.2 <u>Clause/s in lease which provide/s for the total or partial demolition or destruction of the premises or building/centre</u>	<u>Clause/s _____ of the lease /</u> <u>Not applicable</u>
<b><u>PART 8 — TRADING HOURS</u></b>	
<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>	
<b><u>21 Core trading hours relevant to the tenant</u></b>	
<u>_____ Monday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Tuesday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Wednesday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Thursday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Friday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Saturday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Sunday</u>	<u>_____ a.m. to _____ p.m.</u>
<u>_____ Public holidays</u>	<u>_____ a.m. to _____ p.m.</u>
<b><u>22 Tenant access to premises outside core trading hours</u></b>	
22.1 <u>Is the tenant permitted to access the premises and building/centre outside the core trading hours?</u>	<input type="checkbox"/> <u>Yes — [Provide details including cost of access]</u> <input type="checkbox"/> <u>No</u>
<b><u>PART 9 — RETAIL SHOPPING CENTRE DETAILS</u></b>	
<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>	
<b><u>23 Retail shopping centre details</u></b>	

<b>Disclosure item</b>	<b>Response</b>
<u>23.1 Total number of shops</u>	<u>shops</u>
<u>23.2 Number of shops leased/occupied</u>	<i>[Insert details for shops owned by the landlord]</i>  Leased <ul style="list-style-type: none"> <li>• <u>Number occupied —</u></li> <li>• <u>Number unoccupied —</u></li> </ul> <u>Number unleased</u>
<u>23.3 Total lettable area of the centre (in m<sup>2</sup>)</u>	<u>m<sup>2</sup></u> <u>Actual/Estimate</u>
<b><u>24 Major/anchor tenants</u></b>	
<u>24.1 Major/anchor tenants and lease expiry dates</u>	<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>
<b><u>25 Floor plan and tenancy mix</u></b>	
<u>25.1 Floor plan showing tenancy mix, common areas, common area trading, kiosks and major tenants</u>	<u>Attached as per item 39.1</u>
<u>25.2 Does the landlord assure the tenant that the current tenant mix will not be altered by the introduction of a competitor</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>No</u>
<b><u>26 Customer traffic flow information</u></b>	
<u>26.1 Does the landlord collect customer traffic flow information?</u>	<input type="checkbox"/> <u>Yes — attached as per item 39.2</u> <input type="checkbox"/> <u>No</u>
<b><u>27 Use of common areas</u></b>	

<b>Disclosure item</b>	<b>Response</b>
27.1 <u>Are common areas able to be used for trading?</u>	<input type="checkbox"/> Yes — <i>[insert details of basis upon which trading permitted]</i> <input type="checkbox"/> No
<b>28 Casual mall licensing for common areas</b>	
28.1 <u>Do you adhere to the Shopping Centre Council of Australia's Casual Mall Licensing Code of Practice?</u>	<input type="checkbox"/> Yes — casual mall licensing policy attached as per item 39.3 <input type="checkbox"/> No
<b>PART 10 — GROUP OF PREMISES</b>	
<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>	
<b>29 Details of group of premises</b>	
29.1 <u>Total number of premises</u>	<u>                    </u> premises
29.2 <u>Number of premises in the group leased/occupied</u>	<i>[Insert details for premises owned by the landlord]</i> Leased • <u>          </u> Number occupied — • <u>          </u> Number unoccupied — <u>          </u> Number unleased
29.3 <u>Total lettable area of the group of premises (in m<sup>2</sup>)</u>	<u>                    </u> m <sup>2</sup> Actual/Estimate
<b>PART 11 — OTHER DISCLOSURES</b>	
<b>30 Other disclosures</b>	
30.1 <u>Are there any current legal proceeding in relation to the lawful use of the premises or building/centre?</u>	<input type="checkbox"/> Yes — <i>[provide details]</i> <input type="checkbox"/> No

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

Disclosure item	Response
<p><b><u>Warnings to landlord when completing this disclosure statement:</u></b></p> <ul style="list-style-type: none"> <li>The tenant may have remedies including termination of lease if the information in this statement is misleading, false or materially incomplete.</li> </ul>	
<p><b><u>35 Landlord's signature</u></b></p>	
<p><u>35.1 Name of landlord</u></p>	<p><i>[Insert name of the landlord]</i></p>
<p><u>35.2 Signed by the landlord or the landlord's agent for and on behalf of the landlord</u></p>	
<p><u>35.3 Name of landlord's authorised representative or landlord's agent</u></p>	<p><i>[Insert name of the person signing with the authority of the landlord]</i></p>
<p><u>35.4 Date</u></p>	<p><i>/ /20</i></p>
<p><b><u>PART 13 — TENANT ACKNOWLEDGMENTS AND SIGNATURE</u></b></p>	
<p><b><u>36 Acknowledgments by the tenant</u></b></p>	
<p><b><u>By signing this disclosure statement, the tenant confirms and acknowledges that the tenant received this disclosure statement.</u></b></p>	
<p><b><u>Warnings to tenant:</u></b></p> <ul style="list-style-type: none"> <li>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;</li> <li>Signing any of the above documents is legally binding on the tenant.</li> </ul>	
<p><b><u>Before entering into a lease, tenants should consider these key questions:</u></b></p> <ul style="list-style-type: none"> <li>Does the planning authority allow your proposed use for</li> </ul>	

<u>Disclosure item</u>	<u>Response</u>
	<p><u>the premises under planning law?</u></p> <ul style="list-style-type: none"> <li>• <u>Is the security of your occupancy affected by:</u> <ul style="list-style-type: none"> <li>• <u>mortgages, charges or encumbrances granted by the landlord?</u></li> <li>• <u>rights and obligations under a head lease?</u></li> </ul> </li> <li>• <u>Do the premises comply with all requirements of building and safety legislation? Are the premises affected by outstanding notices by any authority?</u></li> <li>• <u>Could your trading be affected by disturbances or changes to the building/centre?</u></li> <li>• <u>Does the landlord require you to refurbish the premises regularly or at the end of the lease?</u></li> <li>• <u>Can the landlord end the lease early even if you comply with the lease?</u></li> <li>• <u>Are all the existing structures, fixtures and plant and equipment in good working order?</u></li> <li>• <u>Are you required to make good the premises at the end of the lease?</u></li> <li>• <u>Is the tenancy mix of the shopping centre (if applicable) likely to change during the course of the lease? — see item 25.2?</u></li> <li>• <u>Who is responsible for building defects?</u></li> <li>• <u>Who is responsible for maintenance, insurance, repairing or replacing finishes, fixtures and fittings, equipment and services?</u></li> </ul>
<b><u>37 Tenant's signature</u></b>	
<b><u>It is important that a tenant seek independent legal and financial advice before entering into a lease.</u></b>	
<u>37.1 Name of Tenant</u>	<i>[Insert name of the tenant]</i>

<b>Disclosure item</b>	<b>Response</b>
<u>37.2 Signed by the tenant or for and on behalf of the tenant</u>	
<u>37.3 Name of the tenant's authorised representative</u>	<i>[Insert name of the person signing with the authority of the tenant]</i>
<u>37.4 Date</u>	<u> / /20</u>
<b><u>PART 14 — ATTACHMENTS</u></b>	
<b><u>38 List of attachments</u></b>	
<u>38.1 Plan of premises (see item 1.2)</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>Not applicable</u>
<u>38.2 Head lease or Crown lease (see item 4.2)</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>Not applicable</u>
<u>38.3 Annual estimate of expenditure (outgoings/operating expenses) (see item 14)</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>Not applicable</u>
<u>38.4 Additional attachments</u>	<i>[List any additional attachments]</i>
<b><u>39 List of attachments — retail shopping centre</u></b>	
<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>	
<u>39.1 Floor plan (see item 25.1)</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>Not applicable</u>
<u>39.2 Customer traffic flow statistics (see item 26.1)</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>Not applicable</u>
<u>39.3 Casual mall licensing policy (see item 28.1)</u>	<input type="checkbox"/> <u>Yes</u> <input type="checkbox"/> <u>Not applicable</u>

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

(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](http://www.slp.wa.gov.au).

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 m<sup>2</sup> 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 \[www.commerce.wa.gov.au\]\(http://www.commerce.wa.gov.au\)\).](#)

[There are some retail shops with a lettable area greater than 1 000 m<sup>2</sup> that are also covered by the Act — a list of these premises can be obtained from the Department of Commerce at \[www.commerce.wa.gov.au\]\(http://www.commerce.wa.gov.au\).](#)

[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 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 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](http://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) 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 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](http://www.commerce.wa.gov.au)). Although the Act allows you to extend 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.

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](http://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, 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
- 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 \[www.commerce.wa.gov.au\]\(http://www.commerce.wa.gov.au\)\).](#)

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.)*

**[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.

### **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.

**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.

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

**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.

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.)

**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 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.

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.)
- 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.](#)

[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.

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.**

**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.

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.