



Western Australia

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

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Western Australia

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

**An Act to regulate commercial tenancy agreements relating to certain shops, to prohibit unconscionable conduct, or misleading or deceptive conduct, by landlords or tenants in relation to such agreements, to provide for the determination of questions arising under such agreements, and for connected purposes.**

*[Long title amended by No. 47 of 2006 s. 20; No. 59 of 2011 s. 4.]*

## Part I — Preliminary

### 1. Short title

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

### 2. Commencement

This Act shall come into operation on a day to be fixed by proclamation<sup>1</sup>.

### 3. Terms used

(1) In this Act, unless the contrary intention appears —

**accountant** means a member of —

- (a) The Institute of Chartered Accountants in Australia; or
- (b) ~~The Australian Society of Certified Practising Accountants~~ CPA Australia Ltd; or
- (c) ~~The National~~the Institute of ~~Public~~ Accountants;

**accounting year** in relation to a lease, means the accounting year specified in the lease or, if not so specified, a financial year;

**building** includes any structure;

**business**, in relation to a retail shop lease, means the business carried on or to be carried on at or from the retail shop the subject of the lease;

**common area**, in relation to a retail shopping centre, means an area within or adjacent to the centre that is intended for use by the public or for use in common by tenants of premises in the centre in connection with the conduct of business at premises in the centre and includes all stairways, escalators, elevators, malls, walkways, trafficways, parking areas, toilets, restrooms, gardens and fountains intended for any such use;

**goodwill**, in relation to a business, means an intangible saleable asset, separate and distinct from the stock, fixtures, fittings, and other tangible assets of the business, arising from the reputation of the business, the relations formed with customers of the business, and the nature of the location of the business;

**group of premises** means —

- (a) a retail shopping centre; or
- (b) 2 or more premises, at least one of which is a retail shop, that are adjacent, or form a cluster —
  - (i) which have, or on being leased would have, a common head lessor; and
  - (ii) are grouped together for the purpose of allocating to each of those premises a portion of an item of operating expenses;

**key-money** means —

- (a) money that is to be paid by, or at the request or direction of, a tenant; or
- (b) any benefit that is to be conferred by, or at the request or direction of, a tenant,

by way of a premium or something of a like nature in consideration of the granting of, or agreeing to grant, a lease or the renewal of a lease or the consenting to an assignment of a lease or the sub-letting of the premises the subject of a lease;

**landlord**, in relation to a lease, means —

- (a) the person who, under the lease, grants or is to grant to the tenant the entitlement to occupy the premises the subject of the lease; or
- (b) a person who obtains a reversionary interest in those premises,

but does not include a person who assigns his interest as tenant under the lease;

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**lease** means any lease, licence, or agreement, whether in writing or not, that provides for the occupation of premises situated within the State whether for a term or by way of a periodic tenancy or a tenancy at will, and whether or not the lease, licence, or agreement is entered into outside the State or purports to be governed by any law other than the law of the State but does not include a licence or agreement relating to the common area of a retail shopping centre by reason only that it provides for a person to use a portion of the common area the continued use of which as a portion of the common area is not intended to be otherwise precluded;

**lettable area**, of a retail shop, means an area of the shop defined or calculated —

- (a) in such manner as is prescribed by the regulations; and
- (b) if the shop is part of a group of premises, in the same, or a substantially similar, manner as the area for each other retail shop in the group of premises is defined or calculated;

**management fees** means fees in respect of costs for or incidental to the collection of rent or other moneys or the management of premises including, but not limited to, such of those costs —

- (a) in respect of —
  - (i) management offices;
  - (ii) plant and equipment;
  - (iii) staff;and
- (b) as are of a kind prescribed;

**misleading or deceptive conduct application** means an application under section 16D(1);

**retail business** means —

- (a) a business that wholly or predominantly involves the sale of goods by retail; or
- (b) a specified business;

**retail shop** means —

- (a) any premises situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a business; or
- (b) any premises not situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a retail business,

but does not include any premises excluded by regulation;

**retail shop lease** means a lease that provides for the occupation of a retail shop, unless —

- (a) the retail shop —
  - (i) has a lettable area that exceeds 1 000 square metres; and
  - (ii) is not of a kind prescribed by the regulations for the purposes of this definition;

or

- (b) the lease is held by —
  - (i) a listed corporation (within the meaning of the *Corporations Act 2001* (Commonwealth) section 9) that would not be eligible to be incorporated as a proprietary company; or
  - (ii) a subsidiary (within the meaning of the *Corporations Act 2001* (Commonwealth) section 9) of such a corporation;

or

- (c) the lease is held by —
  - (i) a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges; or

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- (ii) a subsidiary (within the meaning of the *Corporations Act 2001* (Commonwealth) section 9) of such a body corporate;

or

- (d) the lease is of a kind that is prescribed by the regulations as exempt from the operation of this Act;

**retail shopping centre** means a cluster of premises —

- (a) 5 or more of which are used for the carrying on of a retail business; and
- (b) all of which —
  - (i) have, or upon being leased would have, a common head lessor; or
  - (ii) comprise lots on a single strata plan under the *Strata Titles Act 1985*,

but, if the premises are in a building with 2 or more floor levels, includes only those levels of the building where a retail business is situated;

**Small Business Commissioner** means the Commissioner as defined in the *Small Business Development Corporation Act 1983* section 3(1);

**specified business** means a business of a kind prescribed by the regulations to be a specified business;

**tenant**, in relation to a lease, means the person who, under the lease, is or would be entitled to occupy the premises the subject of the lease;

**Tribunal** means the State Administrative Tribunal;

**unconscionable conduct application** means an application under section 15F(1).

- (2) Where the parties to a retail shop lease enter into, either before or after entering into the retail shop lease, a written or oral agreement or arrangement that contains a provision which if contained in the retail shop lease would be void, that provision



is for the purposes of this Act deemed to be contained in the retail shop lease and this Act applies to and in relation to that provision as if it were so contained.

- (3) A reference in this Act to a question arising under a retail shop lease includes a reference to —
- (a) a question whether or not a lease exists or has existed, including a question as to forfeiture; or
  - (b) a question whether or not a lease is or was a retail shop lease; or
  - (c) a question arising —
    - (i) in relation to any communication, including a disclosure statement under section 6, between the parties to the retail shop lease, prior to their entry into the retail shop lease, which communication was material to the terms and conditions of the retail shop lease; or
    - (ii) in relation to the retail shop lease under a provision of this Act;
- or
- (d) a matter that is in dispute between the landlord and the tenant under section 12 in relation to —
    - (i) operating expenses of the landlord under the retail shop lease generally; or
    - (ii) an allocation made under section 12(1)(b) of the proportion of those operating expenses; or
    - (iii) a determination of the relevant proportion for the purposes of section 12;
- or
- (e) any other matter that is in dispute between the landlord and the tenant in connection with the retail shop lease, whether or not that matter is dealt with by the provisions of the retail shop lease.

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- (4) For the purposes of this Act a retail shop lease is entered into when —
- (a) under the retail shop lease, the tenant enters into possession of, or commences to pay rent in respect of, the premises the subject thereof; or
  - (b) where the retail shop lease is in writing, all of the parties thereto have signed the retail shop lease,

whichever first occurs.

*[Section 3 amended by No. 49 of 1985 s. 3; No. 48 of 1990 s. 4; No. 56 of 1997 s. 24; No. 66 of 1998 s. 4; No. 10 of 2001 s. 38; No. 55 of 2004 s. 117; No. 47 of 2006 s. 21; No. 20 of 2011 s. 30; No. 59 of 2011 s. ~~5~~; No. 17 of 2014 s. 14.]*

**4. Application of Act**

- (1) Subject to subsection (2), this Act does not apply to or in relation to a retail shop lease that was entered into —
- (a) before the relevant day; or
  - (b) pursuant to an option granted or agreement made before the relevant day.
- (2) Section 16 applies to and in relation to a retail shop lease whether or not it was entered into as mentioned in subsection (1), but section 27 has no effect in relation to a question arising under a retail shop lease if it was entered into as mentioned in subsection (1).
- (3) In this section the **relevant day**, in relation to a retail shop lease, means the day on which this Act comes into operation or, where the lease is a retail shop lease by reason only of a regulation prescribing a business of a particular kind to be a specified business, means the day on which that regulation comes into operation.
- (4) Regulations may be made exempting from all or any of the provisions of this Act —

- (a) a prescribed person, retail shop lease or retail shop; or
  - (b) a prescribed class of persons, retail shop leases or retail shops.
- (5) The regulations may provide for conditions and restrictions subject to which an exemption is to apply.

*[Section 4 amended by No. 55 of 2004 s. 118; No. 59 of 2011 s. 6.]*

**5. Crown bound**

This Act binds the Crown.

## **Part II — Retail shop leases**

**6. Disclosure statement, tenant's rights if not given by landlord etc.**

- (1) Where a retail shop lease is entered into and the tenant has not, at least 7 days before the entering into of the lease, been given a disclosure statement in accordance with subsection (4) or the disclosure statement given is incomplete or contains false or misleading information, the tenant may, in addition to exercising any other right, do either or both of the following —
  - (a) within 6 months after the lease was entered into give to the landlord written notice of termination of the lease, unless subsection (3) prevents termination;
  - (b) apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of —
    - (i) the omission of the landlord to give a disclosure statement in accordance with subsection (4); or
    - (ii) the giving of an incomplete disclosure statement by the landlord; or
    - (iii) the giving of false or misleading information by the landlord in the disclosure statement.
- (2) Where the tenant under a retail shop lease gives to the landlord a notice of termination under subsection (1) the lease terminates upon the expiry of a period of 14 days after the notice was given.
- (3) A tenant cannot terminate a lease under this section on the ground that the tenant has been given a disclosure statement that is incomplete or contains false or misleading information if —
  - (a) the landlord has acted honestly and reasonably and ought reasonably to be excused for the failure concerned; and

- (b) the tenant is in substantially as good a position as the tenant would have been if the statement had been complete or had not contained the false or misleading information.
- (4) A disclosure statement given for the purposes of this section shall be in the prescribed form duly completed and signed by or on behalf of the landlord and the tenant and shall contain a statement notifying the tenant that he should seek independent legal advice.
- (5) Where the tenant under a retail shop lease (in this subsection referred to as the *outgoing tenant*) assigns the lease to another person (in this subsection referred to as the *incoming tenant*), nothing in this section gives to the incoming tenant a right to terminate the lease that the outgoing tenant would not have had if he had continued as the tenant under the lease.
- (6) A disclosure statement is not required to be given —
  - (a) on the renewal of a retail shop lease under an option (including the option arising by reason of section 13(1)); or
  - (b) on the assignment of a retail shop lease.

*[Section 6 amended by No. 48 of 1990 s. 5; No. 59 of 2011 s. 7.]*

**6A. Tenant guide, tenant's rights if not in lease etc.**

- (1) Where a retail shop lease is entered into and the retail shop lease does not incorporate a tenant guide in accordance with subsection (4), the tenant may, in addition to exercising any other right, do either or both of the following —
  - (a) within 60 days after the lease was entered into, give to the landlord written notice of termination of the lease;
  - (b) apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of the

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failure to incorporate the tenant guide in the retail shop lease in accordance with subsection (4).

- (2) Where the tenant under a retail shop lease gives to the landlord a notice of termination under subsection (1) the lease terminates upon the expiry of a period of 14 days after the notice was given.
- (3) In addition to exercising the tenant's rights under subsection (1)(b), the tenant may, after the expiry of the period referred to in subsection (1)(a), apply in writing to the Tribunal for an order that the retail shop lease be terminated.
- (4) The tenant guide shall be in the prescribed form and located in the prescribed position in the retail shop lease.
- (5) Where the tenant under a retail shop lease (in this subsection referred to as the *outgoing tenant*) assigns the lease to another person (in this subsection referred to as the *incoming tenant*), nothing in this section gives to the incoming tenant a right to terminate the lease that the outgoing tenant would not have had if he or she had continued as the tenant under the lease.
- (6) The tenant guide is not required to be included —
  - (a) on the renewal of a retail shop lease under an option (including the option arising by reason of section 13(1)); or
  - (b) on the assignment of a retail shop lease.

*[Section 6A inserted by No. 66 of 1998 s. 5.]*

**7. Rent based on turnover, provision for in lease is void in some cases**

- (1) Without limiting subsection (2)(a), where a retail shop lease contains a provision to the effect that the rent is to be determined either in whole or in part by reference to the turnover of the business and —

- (a) the tenant did not, by notice in writing in the prescribed form given to the landlord before the provision was included in the lease, elect that the rent should be so determined; and
- (b) the tenant, by notice in writing given to the landlord, objects to the rent being so determined,

the provision is void as from the day on which the notice referred to in paragraph (b) is given.

- (2) Where a retail shop lease contains a provision to the effect that the rent is to be determined either in whole or in part by reference to the turnover of the business —
  - (a) that provision is void if the lease does not specify the formula by which the amount of the rent is to be determined; and
  - (b) unless by reason of this section that provision is void, the lease shall be taken to provide that the tenant shall furnish to the landlord —
    - (i) not later than 14 days after the end of each month in respect of which the rent or any of the rent is to be so determined or at such other times as are agreed between the parties, a statement in writing specifying the turnover of the business during that month; and
    - (ii) not later than 42 days after the end of each calendar year, or each financial year of the business, during which the rent or any of the rent is to be so determined or at such other times as are agreed between the parties, and at the termination of the lease, a statement of the turnover of the business certified by an accountant to truly and accurately represent the turnover of the business during the last preceding year or, where the lease has terminated other than

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at the end of a year, during the part of that year before which the lease terminated.

- (3) Where the tenant under a retail shop lease furnishes to the landlord statements in accordance with subsection (2)(b)(i) and (ii) in respect of a period he shall be taken to have satisfied any obligation under the lease to provide turnover figures or statements in relation to the business in respect of that period but shall, at the request of the landlord, permit an accountant engaged by the landlord to carry out an audit of those turnover figures at the cost of the landlord and shall reimburse the landlord for the cost of the audit if the audit discloses that the statement furnished under subsection (2)(b)(ii) understated the turnover of the business during the relevant period by more than 5%.
- (4) For the purposes of subsection (2)(b) and (3) and the construction of any provision of a retail shop lease that relates to the determination of rent by reference to turnover (but without limiting the generality of that expression in subsection (1)), **turnover** does not include —
- (a) the nett amount of discounts reasonably and properly allowed to any customer in the usual course of business; and
  - (b) the amount of losses incurred in the resale or disposal of goods reasonably and properly purchased from customers as trade-ins in the usual course of business; and
  - (c) the amount of uncollected credit accounts written off by the tenant; and
  - (d) the amount of any cash or credit refund allowed on a transaction the proceeds of which have previously been included as gross receipts where the merchandise is returned and the sale is cancelled or fees for the services are refunded wholly or partly; and



- (e) the amount of any instalment of purchase moneys refunded to customers where a lay-by transaction is cancelled; and
  - (f) the amount of any purchase, receipt or other similar tax imposed upon the purchase price or cost of hire of merchandise or services at the point of sale or hire; and
  - (g) the amount of delivery charges; and
  - (h) the price of merchandise exchanged between stores of the tenant made solely for the convenient operation of business and not for the purpose of concluding a sale made at or from the retail shop the subject of the lease; and
  - (i) the price of merchandise returned to shippers, wholesalers or manufacturers; and
  - (j) the amount received from the sale of the fixtures and fittings of the tenant from the retail shop the subject of the lease; and
  - (k) receipts from sales of tickets in any lottery within the meaning of that term in the *Lotteries Commission Act 1990*, other than amounts derived as commission or fees from those sales.
- (5) Where by reason of this section, a provision of a retail shop lease to the effect that rent is to be determined either in whole or in part by reference to the turnover of the business is void, the rent shall be as is agreed in writing between the parties or determined by the Tribunal.

*[Section 7 amended by No. 26 of 1998 s. 23; No. 5 of 2008 s. 17.]*

**8. Turnover figures of tenant, provision in lease requiring is void in some cases**

- (1) A provision in a retail shop lease —

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- (a) to the effect that the tenant is obliged to furnish, or permit the landlord or his agent to gather, figures or statements relating to the turnover of the business; or
- (b) to the effect that the landlord is entitled to be furnished with figures or statements relating to the turnover of the business,

is void unless the figures or statements are required for the purpose of determining rent either in whole or in part by reference to the turnover of the business.

- (2) Where a retail shop lease contains a provision of a kind referred to in subsection (1) and the figures or statements to which the provision applies are required for the purpose of determining rent either in whole or in part by reference to the turnover of the business, that provision ceases to have effect upon those figures or statements being no longer required for the purpose.

**9. Key-money or goodwill, provision for in lease is void in some cases**

- (1) Subject to subsection (2), a provision in a retail shop lease to the effect that the landlord or a person claiming through him is entitled to, or may require from the tenant —
  - (a) key-money; or
  - (b) any consideration in respect of the goodwill of the business,

is void.

- (1a) Without limiting subsection (1), where a retail shop lease provides to the effect that the landlord or a person claiming through him is entitled to or may require from the tenant money or any other benefit in consideration of —
  - (a) a rent under the lease which is lower than the rent which would otherwise be payable; or
  - (b) a future reduction in rent payable under the lease,

that money or other benefit is to be taken to be key-money for the purposes of subsection (1) unless the landlord or person claiming through him proves otherwise.

- (2) Subsection (1) or (1a) shall not be construed so as to make void a provision in a retail shop lease for the landlord to receive or recover from the tenant —
- (a) any sum that the tenant has agreed to pay to the landlord in respect of the goodwill of a business carried on by the landlord in the retail shop concerned immediately before the lease was entered into; or
  - (b) expenses reasonably incurred by the landlord in investigating a proposed assignee of the tenant or sub-lessee of the premises; or
  - (c) fair and reasonable expenses of the landlord in respect of the drawing up of or the obtaining of necessary consents to the lease, an assignment of the lease or a sub-lease of the premises.
- (3) Any amount paid or the value of any benefit conferred by a person under a provision of a lease that is void by reason of subsection (1) or (1a) may be recovered by that person from the person to whom the amount was paid or on whom the benefit was conferred upon an application to the Tribunal for an order that the money sought be paid or in a court of competent jurisdiction as a debt due.

*[Section 9 amended by No. 48 of 1990 s. 6; No. 55 of 2004 s. 119.]*

**10. Tenant's right to assign lease, landlord's consent to assignment or sub-lease etc.**

- (1) Notwithstanding any other written law, a retail shop lease shall be taken to grant to the tenant a right to assign the lease, subject only to a right of the landlord to withhold consent to an assignment on reasonable grounds.

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- (2) Where a tenant under a retail shop lease has in writing requested the landlord to consent to —
- (a) an assignment of the lease; or
  - (b) where the lease provides for a sub-lease of the premises by consent, a sub-lease of the premises,

and the landlord fails to give notice in writing of consent or withholding of consent to the tenant within 28 days after receiving the request, the landlord shall be taken to have consented to the assignment or sub-lease, as the case may be.

- (3) A provision in a retail shop lease to the effect that the landlord may withhold consent to an assignment of the lease by a tenant unless the tenant or a guarantor of the tenant, agrees to pay any moneys that are payable under the lease by the person to whom it is proposed to assign the lease is void.
- (4) A provision in a retail shop lease to the effect that the landlord or a person claiming through the landlord may recover from the assignor or from a guarantor of the assignor, any moneys that are payable under the lease by the tenant to whom the lease has been assigned is void.
- (5) In this section —

***assignor*** means a tenant who assigns a lease in accordance with this section;

***guarantor*** means a person who has guaranteed the performance by a tenant of the tenant's obligations under a retail shop lease or a person who has indemnified a landlord against any loss the landlord may incur as a result of the failure by a tenant to comply with those obligations;

***moneys payable under the lease*** includes moneys recoverable by action under the lease.

*[Section 10 inserted by No. 48 of 1990 s. 7; amended by No. 66 of 1998 s. 6.]*

**11. Rent review, provisions for in lease and conduct of etc.**

- (1) A provision in a retail shop lease for review of the amount of rent payable under the lease during the currency of the lease is void unless the lease specifies, in respect of each occasion on which the review is to be made, a single basis on which the review is to be made.
- (2) If a retail shop lease provides for the review during the currency of the retail shop lease of the amount of rent payable under the retail shop lease having regard to the market rent of the retail shop concerned —
  - (a) that market rent shall, for that purpose, be taken to be the rent obtainable at the time of that review in a free and open market as if, all the relevant factors, matters or variables used in proper land valuation practice having been taken into account, that retail shop were vacant and to let on similar terms as are contained in the current retail shop lease, and is not to take into account the value of —
    - (i) the goodwill of the business carried on in the retail shop; or
    - (ii) any stock, fixtures or fittings in the retail shop that are not the property of the landlord; or
    - (iii) any structural improvement, or alteration, of the retail shop carried out, or paid for, by the current tenant;
  - and
  - (b) unless specific provision is made in the retail shop lease for the time at which a review may be initiated, a party to the retail shop lease may not more than 3 months before the date on which that review is to be carried out and not more than 6 months after that date, initiate the review by notice in writing served on the other party to the retail shop lease; and

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- (c) a provision in the retail shop lease purporting to preclude the increase or reduction of that market rent or to limit the extent to which that market rent may be increased or reduced is void.
- (2a) A provision in a retail shop lease purporting to preclude the tenant from voluntarily disclosing the rent under the lease is void.
- (3) A retail shop lease that provides for review of the amount of rent payable during the currency of the lease shall be taken to provide that where the parties do not agree on the rent payable as a result of the review, the question shall be resolved, subject to subsection (5), by any of the following —
  - (a) a person licensed under the *Land Valuers Licensing Act 1978* agreed to by each of the parties;
  - (ba) a person licensed under that Act and nominated, at the request of each of the parties, by the Small Business Commissioner;
  - (b) 2 persons licensed under that Act, one of whom is appointed by the landlord and one of whom is appointed by the tenant.
- (3a) If the parties to a retail shop lease referred to in subsection (3) do not agree on the rent payable as a result of the review concerned, the rent payable immediately before that review shall not be increased or reduced before the question is resolved or determined under this section, but nothing in this subsection prevents any increase or reduction in rent which takes place after that resolution or determination from being due and payable with effect from the date of that review.
- (3B) A landlord under a retail shop lease must, to assist in determining the rent payable as a result of the review, within 14 days after being given a written request to do so by a person who acts under subsection (3), give that person such relevant information as is requested, including any of the following

information, about leases for retail shops in the same building or retail shopping centre —

- (a) current rental for each lease;
- (b) rent free periods or any other form of incentive;
- (c) recent or proposed variations of any lease;
- (d) outgoings for each lease;
- (e) any other information prescribed for the purposes of this paragraph.

(3C) If a landlord fails to comply with a request made under subsection (3B) without reasonable excuse —

- (a) the person who made the request must, within 7 days after the landlord has failed to comply with the request, give to the tenant written notice of the landlord's failure; and
- (b) the tenant may apply in writing to the Tribunal for an order that the landlord comply with a request made under subsection (3B) to supply the information requested.

(4) A person who acts under subsection (3) shall, at the request of and on payment of the required fee by a party to the lease, provide reasons for his decision in writing to that party.

(5) Notwithstanding subsection (3), a party to a retail shop lease may refer to the Tribunal for determination a question as to the rent payable as a result of the review by the parties where —

- (a) the persons acting under subsection (3)(b) fail to reach an agreement on the rent to be paid; or
- (b) a person has not acted under subsection (3) and the leave of the Tribunal has been obtained,

but otherwise such a question shall not be referred to the Tribunal.

*[(6), (7) deleted]*

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- (8) In determining a question under subsection (5) the Tribunal, after considering all the circumstances of the case, may determine that any increase or reduction in rent payable as a result of the determination of the Tribunal under that subsection is payable over such period as the Tribunal thinks fit.

*[Section 11 amended by No. 48 of 1990 s. 8; No. 66 of 1998 s. 7; No. 55 of 2004 s. 120; No. 20 of 2011 s. 31; No. 59 of 2011 s. 8.]*

**11A. Information given under s. 11, restrictions on disclosing**

- (1) A person given information by a landlord under section 11(3B) must not disclose that information to any other person unless the disclosure is made —
- (a) for the purpose of, or in connection with, determining the rent payable as a result of the review; or
  - (b) in a way that does not disclose information identifying a particular lease or tenant, or relating to a tenant's business, for the purpose of specifying the matters to which the person had regard in resolving the question concerned; or
  - (c) with the consent of both the tenant and the landlord of the relevant retail shop; or
  - (d) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings; or
  - (e) as required or permitted under this Act or any other law; or
  - (f) with any other lawful excuse.
- (2) Subsection (1) does not prevent a person from disclosing information that is publicly available at the time the disclosure concerned was made.
- (3) If a person discloses information in contravention of subsection (1) and the tenant or landlord suffers loss or damage because of the disclosure, the tenant or landlord is entitled to be



paid by the person who made the disclosure compensation for the loss or damage —

- (a) of such reasonable amount as is agreed between the person and the tenant or landlord; or
- (b) failing agreement, as may be determined by the Tribunal on the application of the tenant or landlord.

*[Section 11A inserted by No. 59 of 2011 s. 9.]*

**12. Landlord's operating expenses etc., effect of provisions in lease for payment by tenant of**

- (1) If provision is made in a retail shop lease for payment by the tenant, in addition to rent, of all or any of the operating expenses of the landlord —
  - (a) the amount payable by the tenant under the retail shop lease is limited to the items of operating expenses that the retail shop lease specifies are to be paid wholly or in part by the tenant and does not include an amount in respect of which the retail shop lease does not specify both —
    - (i) how that amount is to be determined and, when applicable, apportioned to the tenant; and
    - (ii) how and when that amount is to be paid by the tenant;
  - and
  - (b) subject to subsection (1e), the proportion of those operating expenses payable by the tenant under the retail shop lease shall not be greater than the relevant proportion without the approval of the Tribunal; and
  - (c) where —
    - (i) the premises the subject of the retail shop lease are part of a group of premises; and

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- (ii) any part of the operating expenses is expenditure incurred as a result of some only of the premises in the group being open outside the standard trading hours,

the retail shop lease shall be taken to provide that a tenant whose retail shop was not so open is not required to make any payment of, and the landlord is not entitled to recover, the expenditure referred to in subparagraph (ii); and

- (d) the retail shop lease shall be taken to provide that —
  - (i) the tenant is not required to make any payment of, and the landlord is not entitled to recover, any such operating expenses in respect of a year or part of a year until at least one month after the landlord has given to the tenant annual estimates of expenditure under each item of operating expenses in respect of the year; and
  - (ii) the landlord is required to give to the tenant a written statement in accordance with subsection (1a) (an ***operating expenses statement***) that details all expenditure by the landlord in each accounting period of the landlord during the term of the lease on account of operating expenses to which the tenant is required to contribute.

(1a) An operating expenses statement —

- (a) is to be given to the tenant within 3 months after the end of the accounting period to which it relates; and
- (b) if the relevant retail shop is in a retail shopping centre, must include a statement of the current total lettable area of the retail shopping centre and details of any material change in that total lettable area during the period to which the statement relates; and
- (c) is to be prepared in accordance with relevant principles and disclosure requirements of the applicable accounting

- standards made by the Australian Accounting Standards Board, as in force from time to time; and
- (d) may be a composite statement (that is, it may relate to more than one tenant) if each tenant to which it relates is able to ascertain from the statement the information required by subsection (1)(d)(ii) that is relevant to that tenant; and
  - (e) is to be accompanied by a report on the statement prepared by a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth which includes a statement by the auditor as to whether or not the operating expenses statement correctly states expenditure by the landlord during the accounting period concerned in respect of operating expenses to which the tenant is required to contribute, and as to whether or not the total amount of estimated operating expenses for that period (as shown in the estimate of operating expenses given to the tenant) exceeded the total actual expenditure by the landlord in respect of those operating expenses during that period.
- (1b) The landlord shall bear half of the cost of an audit referred to in subsection (1a)(e) and the other half of that cost shall be borne by —
- (a) the tenant to whose premises that audit relates; or
  - (b) if there is more than one tenant to whose premises that audit relates, jointly in the relevant proportions.
- (1c) An operating expenses statement is not required to be accompanied by an auditor's report if the statement does not relate to any operating expenses other than land tax (unless subsection (1g) applies), water, sewerage and drainage charges, local government rates and charges or insurance premiums and it is accompanied by copies of assessments, invoices, receipts or other proof of payment in respect of all expenditure by the landlord referred to in subsection (1)(d)(ii).

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- (1d) If a landlord does not comply with the requirement referred to in subsection (1)(d)(ii), the tenant is not obliged to pay, and the landlord is not entitled to recover, operating expenses from the date of that noncompliance until the landlord complies with that requirement.
- (1e) A tenant under a retail shop lease in respect of a retail shop in a group of premises —
- (a) is not liable to contribute towards an operating expense of the landlord that is not specifically referable to any particular premises in the group of premises unless the shop is one of the premises to which the operating expense is referable; and
  - (b) is not liable to contribute an amount in excess of an amount calculated by multiplying the total amount of that operating expense by the proportion that the lettable area of the shop bears to the total lettable area of all of the premises in the group of premises to which the operating expense is referable, without the approval of the Tribunal.
- (1f) If there is a provision in a retail shop lease in respect of any premises to the effect that the tenant is obliged to make a payment to or for the benefit of the landlord for management fees, the landlord is not entitled to recover, and the tenant is not obliged to make, that payment.
- (1g) If provision is made in a retail shop lease for payment by the tenant of all or any of the land tax or metropolitan region improvement tax imposed in relation to the land on which the retail shop is situated it is a term of that retail shop lease that the tenant shall only be obliged to pay, and the landlord shall only be able to recover, whether directly or indirectly, from the tenant in relation to that land —
- (a) where the premises the subject of the retail shop lease comprise the whole of the land, the notional land tax imposed; and

- (b) where the premises the subject of the retail shop lease do not comprise the whole of the land, the relevant proportion of the notional land tax imposed.
- (2) A provision in a retail shop lease in respect of premises in a retail shopping centre to the effect that the tenant is obliged to make a payment to or for the benefit of the landlord, whether by way of contribution to a sinking fund or otherwise, for or in respect of the amortisation of all or part of the costs of or incidental to —
- (a) the construction of the retail shopping centre; or
  - (b) any extension of the centre or structural improvement to the centre; or
  - (c) any plant or equipment that is or becomes the property of the owner of the retail shopping centre,

is void.

- (3A) A provision in a retail shop lease to the effect that the tenant is obliged to contribute towards the cost of any of the landlord's finishes, fixtures, fittings, equipment or services is void unless the disclosure statement given to the tenant under section 6 contains a statement notifying the tenant of the effect of the provision.

- (3) In this section and section 12A —
- group of premises** includes a part of a group of premises;
- land tax** means tax imposed by the *Land Tax Act 2002*;
- metropolitan region improvement tax** means metropolitan region improvement tax under the *Planning and Development Act 2005*;
- notional land tax** means land tax and metropolitan region improvement tax calculated on the basis that the land on which the tax is assessed is the only land of which the landlord is the owner within the meaning of that term in the *Land Tax Assessment Act 2002*;

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**operating expenses**, in relation to a landlord, means expenses of the landlord in operating, repairing or maintaining —

- (a) a building of which a retail shop the subject of a retail shop lease to which the landlord is a party forms the whole or a part; or
- (b) if that retail shop is in a retail shopping centre, the building or buildings of which a retail shop the subject of a retail shop lease to which the landlord is a party forms the whole or a part and the common area,

and includes, if a strata titles levy is imposed on the landlord, that part of the levy which relates to expenses of the landlord in operating, repairing or maintaining the building or buildings of which the retail shop forms part or that building or those buildings and the common area, as the case requires;

**referable**, in relation to an operating expense for a retail shop, means the retail shop enjoys or shares the benefit resulting from the operating expense;

**relevant proportion**, in relation to a retail shop that is part of a group of premises, means the proportion that the lettable area of the retail shop bears to the total lettable area of the group of premises at the commencement of the accounting year;

**standard trading hours** means the hours prescribed for the purposes of subsection (1)(c);

**strata titles levy** means a contribution levied under section 36 of the *Strata Titles Act 1985*;

**total lettable area**, of a group of premises, or part of a group of premises, means the aggregate of —

- (a) the lettable areas of the premises that are retail shops (or areas set aside for retail shops); and
- (b) if any of the premises are not retail shops, the lettable area of those premises defined or calculated in such manner as is prescribed by the regulations.

*[Section 12 amended by No. 48 of 1990 s. 9; No. 66 of 1998 s. 8; No. 10 of 2001 s. 220; No. 45 of 2002 s. 10; No. 55 of 2004 s. 121; No. 38 of 2005 s. 15; No. 59 of 2011 s. 10.]*

**12A. Sinking fund for repairs etc., effect of lease requiring payment by tenant into etc.**

- (1) This section applies if provision is made in a retail shop lease in respect of premises in a retail shopping centre for payments to be made by the tenant into a sinking fund for repairs or maintenance or any similar purpose.
- (2) The purpose of the sinking fund is to be specified in the retail shop lease.
- (3) The lease shall be taken to provide that —
  - (a) the landlord is to, as soon as practicable, pay amounts paid by the tenant for the credit of the sinking fund into one or more appropriately designated interest bearing accounts held by the landlord with a bank in the State; and
  - (b) the landlord may only apply amounts standing to the credit of the sinking fund and interest earned on the fund for —
    - (i) the purpose mentioned in subsection (2); and
    - (ii) taxes and imposts payable on the fund; and
    - (iii) the cost of an audit referred to in paragraph (c)(iii); and
    - (iv) accounting, legal and other professional costs reasonably incurred in the preparation and approval of the scheme of repayment referred to in paragraph (e);and
  - (c) the landlord is to —

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- (i) keep full and accurate accounts of all money received or held by the landlord in respect of the sinking fund; and
  - (ii) keep the accounts in such manner that they can be conveniently and properly audited; and
  - (iii) at the end of each accounting year cause the accounts to be audited by an auditor who is a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth; and
  - (iv) within 3 months after the end of each accounting year deliver a copy of that report to the tenant;
- and
- (d) subject to subsection (5), the landlord is liable to pay into the sinking fund any deficiency attributable to the failure by the landlord or any predecessor in title of the landlord to comply with paragraph (a) or (b); and
  - (e) if the retail shopping centre is destroyed, demolished or ceases to operate the landlord is to —
    - (i) prepare a scheme of repayment detailing —
      - (I) the amount standing to the credit of the sinking fund (including any interest earned on the fund); and
      - (II) the relevant proportion of that amount to which each former tenant is entitled; and
      - (III) the way in which the landlord proposes to distribute that amount based upon the relevant proportion;
- and
- (ii) submit the scheme of repayment to the Tribunal for approval under subsection (4).
- (4) The Tribunal is to examine a scheme of repayment submitted under subsection (3)(e)(ii) and may approve the scheme or



require such amendments to be made to the scheme as the Tribunal thinks fit and the landlord is to repay to each former tenant the amount set forth in the scheme of repayment or amended scheme of repayment, as the case requires.

- (5) A landlord is only liable for a deficiency under subsection (3)(d) in respect of a claim for that deficiency notified to the landlord by the tenant within a period of 3 years following the receipt by the tenant of the copy of the report of the auditor referred to in subsection (3)(c)(iv) disclosing the deficiency.
- (6) If a landlord does not comply with the requirement referred to in subsection (3)(c)(iv), the tenant is not obliged to pay, and the landlord is not entitled to recover, payments to the sinking fund from the date of that noncompliance until the landlord complies with that requirement.
- (7) In this section and in section 12B —
- bank** means —
- (a) an ADI (authorised deposit-taking institution) as defined in section 5 of the *Banking Act 1959* of the Commonwealth; or
  - (b) a bank constituted by a law of a State, a Territory or the Commonwealth;

**former tenant** in relation to premises means the last tenant to carry on business at those premises.

*[Section 12A inserted by No. 66 of 1998 s. 9; amended by No. 26 of 1999 s. 65(2) and (3); No. 10 of 2001 s. 220; No. 55 of 2004 s. 122.]*

**12B. Fund for marketing etc. retail shopping centre, effect of lease requiring payment by tenant into etc.**

- (1) This section applies if provision is made in a retail shop lease in respect of premises in a retail shopping centre for payments to be made by the tenant into a fund (other than a fund referred to in section 12A) or a reserve for marketing or promotion of the retail shopping centre or any similar purpose.

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- (2) The purpose of the fund or reserve is to be specified in the retail shop lease.
- (3) The lease shall be taken to provide that —
- (a) the landlord is to, as soon as practicable, pay amounts paid by the tenant for the credit of the fund or reserve into one or more appropriately designated interest bearing accounts held by the landlord with a bank in the State; and
  - (b) the landlord may only apply amounts standing to the credit of the fund or reserve and interest earned on the fund or reserve for —
    - (i) the purpose mentioned in subsection (2); and
    - (ii) taxes and imposts payable on the fund or reserve; and
    - (iii) the cost of an audit referred to in paragraph (c)(iii); and
    - (iv) accounting, legal and other professional costs reasonably incurred in the preparation and approval of the scheme of repayment referred to in paragraph (e);and
  - (c) the landlord is to —
    - (i) keep full and accurate accounts of all money received or held by the landlord in respect of the fund or reserve; and
    - (ii) keep the accounts in such manner that they can be conveniently and properly audited; and
    - (iii) at the end of each accounting year cause the accounts to be audited by an auditor who is a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth; and

- (iv) within 3 months after the end of each accounting year deliver a copy of that report to the tenant;
- and
- (d) subject to subsection (5), the landlord is liable to pay into the fund or reserve any deficiency attributable to the failure by the landlord or any predecessor in title of the landlord to comply with paragraph (a) or (b); and
- (e) if the retail shopping centre is destroyed, demolished or ceases to operate the landlord is to —
  - (i) prepare a scheme of repayment detailing —
    - (I) the amount standing to the credit of the fund or reserve (including any interest earned on the fund or reserve); and
    - (II) the proportion of that amount to which each former tenant is entitled; and
    - (III) the way in which the landlord proposes to distribute that amount;
  - and
  - (ii) submit the scheme of repayment to the Tribunal for approval under subsection (4).
- (4) The Tribunal is to examine a scheme of repayment submitted under subsection (3)(e)(ii) and may approve the scheme or require such amendments to be made to the scheme as the Tribunal thinks fit and the landlord is to repay to each former tenant the amount set forth in the scheme of repayment or amended scheme of repayment, as the case requires.
- (5) A landlord is only liable for a deficiency under subsection (3)(d) in respect of a claim for that deficiency notified to the landlord by the tenant within a period of 3 years following the receipt by the tenant of the copy of the report of the auditor referred to in subsection (3)(c)(iv) disclosing the deficiency.
- (6) If a landlord does not comply with the requirement referred to in subsection (3)(c)(iv), the tenant is not obliged to pay, and the

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landlord is not entitled to recover, payments to the fund or reserve from the date of that noncompliance until the landlord complies with that requirement.

*[Section 12B inserted by No. 66 of 1998 s. 9; amended by No. 26 of 1999 s. 65(4); No. 10 of 2001 s. 220; No. 55 of 2004 s. 123.]*

**12C. Opening hours, provision in lease for is void etc.**

- (1) A provision in a retail shop lease which requires a tenant to open the retail shop the subject of the lease at specified hours or specified times is void.
- (2) Where —
  - (a) a landlord has refused to renew a retail shop lease; and
  - (b) the tenant under the retail shop lease believes that the refusal was because the tenant did not open the retail shop the subject of the lease at specified hours or specified times,

the tenant may apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of the failure to renew the retail shop lease.

*[Section 12C inserted by No. 66 of 1998 s. 9.]*

**12D. Tenants' association etc., provision in lease preventing tenant from forming etc. is void etc.**

- (1) A provision in a retail shop lease is void to the extent that it has the effect of preventing or restricting the tenant from forming, joining or taking part in any activities of a tenants' association, chamber of commerce or similar body.
- (2) If a tenant under a retail shop lease —
  - (a) forms or joins; or

- (b) proposes to form or join,  
a tenants' association, chamber of commerce or similar body,  
the landlord is not to treat or propose to treat the tenant less  
favourably than a tenant in similar circumstances who does not  
do or propose to do any of those things.
- (3) A tenant under a retail shop lease may apply in writing to the  
Tribunal in respect of a failure by the landlord to comply with  
subsection (2) for one or both of the following orders —
- (a) an order that the landlord pay compensation to the tenant  
in respect of pecuniary loss suffered by the tenant as a  
result of the failure;
  - (b) an order that the landlord do, or refrain from doing,  
anything specified in the application.

*[Section 12D inserted by No. 47 of 2006 s. 22.]*

**13. Tenant entitled to at least 5 year term in some cases etc.**

- (1) Subject to this section, where under a retail shop lease —
- (a) the term of the lease (in this section called the **current term**) is more than 6 months but less than 5 years; and
  - (b) the current term plus any term (in this section called the **option term**) that may be obtained by the tenant by way of an option to renew the lease totals more than 6 months but less than 5 years,

the lease shall be taken to give the tenant an option to renew the lease for a term commencing immediately after the expiry of the current term and the option term, if any, and ending on a day specified by the tenant that is not later than 5 years after the day of commencement of the current term.

- (2A) For the purposes of subsection (1), a lease for a term of more than 6 months includes a tenancy where the tenant has been continuously in possession of the retail shop for more than 6 months as a result of either or both of the following —

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- (a) the lease being renewed (one or more times);
  - (b) the lease being continued.
- (2) Subsection (1) does not apply to a retail shop lease in respect of premises —
  - (a) if the tenant occupied the premises as a retail shop for a period, including any time prior to the commencement of this Act, ending immediately before the commencement of the current term and that period plus the current term and the option term, if any, totals 5 years or longer; or
  - (b) if the landlord holds the premises under a lease (in this section and section 13A called the *head lease*) and renewal of the retail shop lease or, in the case of a retail shop lease containing an option to renew, renewal for a term longer than the option term, would be inconsistent with the head lease.
- (3) The option that a lease is, by reason of subsection (1), taken to give a tenant —
  - (a) is exercisable, by notice in writing in the prescribed form given to the landlord, not less than 30 days before the expiry of the current term, or the option term, as the case may require or during such other period before the expiry of the current term, or the option term, as the case may require as the Tribunal, having regard to the term of the lease or such other circumstances as it considers relevant, approves in a particular case; but
  - (b) is not exercisable while there exists any unremedied default under the lease on the part of the tenant notice of which has been given by the landlord, in writing, to the tenant.
- (3a) Notwithstanding subsection (3), where a party to a retail shop lease has referred to the Tribunal a question as to whether there is an unremedied default under the lease by the tenant (being a default of which written notice has been given by the landlord to

the tenant), the Tribunal, after considering all the circumstances of the case, may determine, by written notice to each party, that the tenant is not required to exercise the option referred to in subsection (3) before the expiry of the current term or the option term, as the case may be, if the question referred to the Tribunal has not been decided by the time of such expiry; and where the Tribunal makes that determination and the question is not decided by the time of such expiry, the current term or the option term, as the case requires, is deemed to be extended —

- (a) if the question is decided in favour of the landlord, to the time when the question is decided; or
- (b) if the question is decided in favour of the tenant, to a period ending 7 days after the tenant receives notification of the decision,

and where paragraph (b) applies, the tenant may exercise the option referred to in subsection (3) during the period designated in that paragraph.

- (3b) Where the current term or the option term of a lease has been extended under subsection (3a)(b) and the tenant exercises the option referred to in subsection (3) during the period of the extension, the lease is deemed to have been renewed for a term commencing immediately after the time when the current term or the option term, as the case may be, would have expired if it had not been so extended.
- (4) Where —
  - (a) the landlord under a retail shop lease holds the premises concerned under a head lease; and
  - (b) it would be inconsistent with the head lease for the retail shop lease to continue until the day provided for by subsection (1); and
  - (c) that inconsistency is not, by reason of section 13A(1), removed,

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

- (5) The terms and conditions upon which a lease is renewable under an option that a lease is, by reason of subsection (1), taken to give a tenant are the same as those upon which the lease is held at the time notice is given of the exercise of that option, except that —
- (a) the tenant does not have any further option under subsection (1) to renew the lease; and
  - (b) where the lease does not provide for a review of rental, the lease shall be taken to provide that the rental payable during the term for which the lease is renewed shall be determined having regard to the market rent of the premises ascertained as provided in section 11(2).
- (6) The landlord under a retail shop lease is not entitled to determine the lease —
- (aa) if the lease is a lease referred to in subsection (1), before the day on which the term that may be obtained by the tenant under that subsection expires; or
  - (ab) if the lease is a lease the current term of which, or the current term plus the option term, is 5 years or longer, before the day that is 5 years after the day on which the current term commenced,
- except —
- (a) by reason of default by the tenant or failure of the tenant to remedy any such default in accordance with the lease; or
  - (b) by reason that —
    - (i) it would be inconsistent with a head lease under which the premises are held by the landlord for the retail shop lease to continue; and



- (ii) that inconsistency is not, by reason of section 13A(1), removed;
- or
- (c) under and in accordance with a provision that is included in the lease with the approval in writing of the Tribunal given under subsection (7) or (7a); or
  - (da) under and in accordance with a provision of the lease that is the same, or substantially the same, as a provision prescribed for the purposes of this section; or
  - (d) where the Tribunal has granted an application by the tenant under subsection (7b), in relation to a lease referred to in paragraph (aa).
- (7) The Tribunal may, upon application made to it by the landlord notice of which has been given to the tenant, approve of the inclusion in a retail shop lease of a provision under which the landlord may determine the lease (other than under subsection (6)(a), (b) or (da)) before the day set out in subsection (6)(aa) or (ab), as is relevant, if it is satisfied that special circumstances exist by reason of which such approval ought to be given.
- (7a) A landlord in relation to a retail shopping centre may make an application under subsection (7) as to any number of retail shop leases in respect of that centre where he is of the opinion that the same special circumstances exist in relation to each lease the subject of his application, and the Tribunal may exercise its powers under that subsection accordingly.
- (7b) The Tribunal may, on application in writing by a tenant or prospective tenant, order that an option of renewal does not arise under subsection (1), if it is satisfied that —
- (a) the application was made by the tenant or prospective tenant of his own free will; and
  - (b) the circumstances of the case warrant the granting of the application.

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- (8) Where the tenant under a retail shop lease assigns the lease, the term to which the assignee becomes entitled is the balance of the term of the assigning tenant, determined as provided by the lease including, where applicable, the option arising under subsection (1), as at the date of the assignment.
- (9) Notwithstanding any other written law, the right of a tenant under subsection (1) is not affected by any assignment or other disposition of the reversion of the premises to which the lease relates.
- (10) For the purposes of this section and notwithstanding section 68 of the *Transfer of Land Act 1893*, an option in a retail shop lease for the tenant to renew the lease is exercisable against any person with a reversionary interest in the premises the subject of the lease whether or not the lease is registered or protected by caveat.

*[Section 13 amended by No. 49 of 1985 s. 4; No. 48 of 1990 s. 10; No. 55 of 2004 s. 124; No. 59 of 2011 s. 11.]*

**13A. Head lease modified if inconsistent with lease affected by s. 13(1)**

- (1) Subject to subsection (3), where —
  - (a) the landlord under a retail shop lease holds the premises concerned under a head lease with which it would be inconsistent for the retail shop lease to continue until the day provided for by section 13(1); and
  - (b) the head lessor and the head lessee under the head lease are related within the meaning given to that expression by subsection (4); and
  - (c) the continuation of the retail shop lease as referred to in paragraph (a) would be consistent with the interest of the head lessor in the premises concerned,

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

- (2) Where agreement has not been reached upon any question as to the extent to which a head lease is modified by operation of subsection (1), a person having an interest in the resolution of the question may refer the question to the Tribunal and Part III applies in relation to the hearing and the agreement or determination of the matter as if —
  - (a) the question were a question arising under a retail shop lease; and
  - (b) the parties to the head lease and, where the person referring the question to the Tribunal is not a party to the head lease, that person were the parties to the retail shop lease.
- (3) The Tribunal may, upon application made to it by the head lessor notice of which has been given to the head lessee and the tenant, determine that there are bona fide commercial reasons, other than the desire to avoid the operation of any provision of section 13, for the head lease and the provisions thereof giving rise to the inconsistency referred to in subsection (1)(a) and, if the Tribunal so determines, subsection (1) is of no effect in relation to that head lease.
- (4) For the purposes of this section the head lessor and the head lessee under a head lease are related if —
  - (a) one of them is, or is the spouse or de facto partner of, a lineal descendant of a grandparent of the other;
  - (b) one of them is a related body corporate of the other within the meaning of the *Corporations Act 2001* of the Commonwealth;
  - (c) one of them is a corporation within the meaning of the *Corporations Act 2001* of the Commonwealth and the other —

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- (i) is an officer, within the meaning of the *Corporations Act 2001* of the Commonwealth, of that corporation; or
  - (ii) is a shareholder of, or holds a beneficial or contingent interest in a share in, that corporation; or
  - (iii) is a discretionary or other beneficiary of a trust, the trustee of which is a shareholder of, or holds a beneficial interest in a share in, that corporation; or
  - (iv) is, or is the spouse or de facto partner of, a lineal descendant of a grandparent of a person described by subparagraph (i), (ii) or (iii);
- (d) one of them is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the other in relation to the premises the subject of the head lease;
- (e) one of them is —
- (i) an employee; or
  - (ii) an agent, a principal, a partner, a nominee, a solicitor, an accountant or an auditor,
- of the other or of a person bearing to the other any of the relationships mentioned in subparagraph (ii);
- (f) one of them is —
- (i) a trustee for the other; or
  - (ii) a trustee of a trust of which the other is a discretionary or other beneficiary.
- (5) For the purposes of this section, where the head lessor or the head lessee, or each of those parties, comprises more than one person, a relationship of a kind mentioned in subsection (4) shall be taken to be established with a party if such a relationship is established with any of the persons of whom or of which that party is comprised.

*[Section 13A inserted by No. 49 of 1985 s. 5; amended by No. 48 of 1990 s. 11; No. 10 of 2001 s. 39; No. 28 of 2003 s. 17; No. 55 of 2004 s. 125.]*

**13B. Lease without option to renew etc., parties' rights under**

- (1) Where a retail shop lease does not provide, whether directly or by operation of section 13, an option or a further option of renewal of the lease and the tenant, within 12 months before the expiry of the lease, in writing requests from the landlord a statement of the intentions of the landlord as to renewal or further renewal of the lease, the landlord shall within 30 days after receiving the request —
  - (a) give a statement in writing of his intentions to the tenant; and
  - (b) subject to subsection (2), where he intends to offer a renewal or further renewal of the lease, specify in that statement the terms and conditions proposed.
- (2) A landlord who gives a statement under subsection (1) is not required to specify the rent proposed to be charged until 3 months before the expiry of the lease.
- (3) Where there is a period after the expiry of the 30 days referred to in subsection (1) during which the landlord fails to comply with subsection (1)(a) and (b) or (2), the expiry of the term of the lease is deemed to be extended by a period equal to that period of noncompliance.
- (4A) A lease may be terminated during a period by which it is deemed to be extended under subsection (3) by the tenant giving written notice of termination of the lease to the landlord specifying a day that is —
  - (a) on or after the date on which the term of the lease ends; and
  - (b) before the date until which the lease is deemed to be extended under subsection (3).

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- (4B) If the tenant gives the landlord a notice of termination under subsection (4A), the lease terminates on the day specified in the notice.
- (4C) If a lease is renewed because of subsection (3) after the term of the lease ends, the lease for the further term commences on the expiry of the previous lease, disregarding for this purpose any period during which that lease is deemed to be extended because of that subsection.
- (4) A landlord is bound by an offer made by him under subsection (1) to renew or further renew the lease if the tenant, within 30 days after receiving the offer, gives to the landlord notice in writing of acceptance of the offer on the terms and conditions proposed by the landlord.
- (5) A proposal as to rent to be charged which is submitted to the tenant after he has been given a statement under subsection (1) is to be taken to be an offer for the purposes of subsection (4).

*[Section 13B inserted by No. 48 of 1990 s. 12; amended by No. 59 of 2011 s. 12.]*

**13C. Lease with option to renew, when option ceases to be exercisable etc.**

- (1) If a retail shop lease provides, whether directly or by operation of section 13, an option or a further option of renewal of the lease exercisable by the tenant, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable —
- (a) at least 6 months; and
  - (b) no more than 12 months,

before that date but is not required to do so if the tenant exercises, or purports to exercise, the option before being notified of the date.

- (2) If subsection (1) requires the landlord to notify the tenant but the landlord fails to do so within the time specified by that subsection —
- (a) the retail shop lease is taken to provide that the date after which the option is no longer exercisable is instead 6 months after the landlord notifies the tenant as required; and
  - (b) if that date is after the term of the lease ends, the lease continues until that date (on the same terms and conditions as applied immediately before the lease term ends); and
  - (c) the tenant, whether or not the landlord has by then notified the tenant as required, may give written notice of termination of the lease to the landlord specifying a day that is —
    - (i) on or after the date on which the term of the lease ends; and
    - (ii) before the date until which the lease would otherwise have continued because of paragraph (b).
- (3) If the tenant gives the landlord a notice of termination under subsection (2)(c), the lease terminates on the day specified in the notice.
- (4) If an option to renew is exercised because of subsection (2)(b) after the term of the lease ends, the lease for the further term commences on the expiry of the previous lease, disregarding for this purpose any period during which that lease continued because of that subsection.

*[Section 13C inserted by No. 59 of 2011 s. 13.]*

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**14. Retail shopping centre shop, lease for deemed to provide for compensation to tenant in some cases**

Where a retail shop lease provides for the occupation of a retail shop situated in a retail shopping centre, the lease shall be taken to provide that if the landlord —

- (a) inhibits the access of the tenant to the retail shop in any substantial manner; or
- (b) takes any action that would substantially alter or inhibit the flow of customers to the retail shop; or
- (c) causes, or fails to make reasonable efforts to prevent or remove, any disruption to trading within the centre which disruption causes loss of profits to the tenant; or
- (d) fails to have rectified as soon as practicable any breakdown of plant or equipment under his care and maintenance which breakdown causes loss of profits to the tenant; or
- (e) fails to adequately clean, maintain, or repaint the building or buildings of which the centre is comprised or any common area connected with the centre,

and after being given by the tenant notice in writing requiring him to rectify the matter does not do so within such time as is reasonably practicable, then notwithstanding any provision contained in the lease, the landlord is liable to pay to the tenant such reasonable compensation in respect thereof as is thereafter agreed in writing between the parties or determined by the Tribunal.

**14A. Relocation of tenant's business, provision in lease for is void in some cases**

- (1) A provision of a retail shop lease about the relocation of the tenant's business is void unless —
  - (a) it is in the form prescribed for the purposes of this section; or



- (b) it is in a form approved by the Tribunal under subsection (3); or
  - (c) if 5 years of the term of the lease (including any period during the extension of the term under an option to renew) have already expired, it is in accordance with subsection (2).
- (2) A provision of a retail shop lease about the relocation of the tenant's business is in accordance with this subsection if it contains provisions to the following effect —
- (a) the tenant's business cannot be required to be relocated unless the landlord has given the tenant at least 6 months written notice of relocation (a *relocation notice*);
  - (b) the relocation notice is to give details of an alternative retail shop (the *alternative shop*) to be made available to the tenant, and if the existing retail shop is situated in a retail shopping centre, the alternative shop is to be situated in that shopping centre;
  - (c) the tenant is to be offered a new lease of the alternative shop —
    - (i) on the same, or better, terms and conditions as the existing lease except that the term of the new lease is to be no shorter than the remainder of the term of the existing lease; and
    - (ii) the rent for the alternative shop is to be no more than the rent for the existing retail shop, adjusted to take into account any difference in the commercial values of the existing retail shop and the alternative shop at the time of relocation;
  - (d) the landlord is to pay the tenant's reasonable costs of the relocation, including but not limited to —
    - (i) costs incurred by the tenant in dismantling fittings, equipment or services; and
    - (ii) costs incurred by the tenant in replacing, re-installing or modifying finishes, fittings,

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- 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 alternative shop; and
- (iii) packaging and removal costs incurred by the tenant; and
  - (iv) legal costs incurred by the tenant;
- (e) if the landlord does not offer the tenant a new lease of an alternative retail shop then the landlord is liable to pay to the tenant such reasonable compensation as is agreed in writing between the parties, or determined by the Tribunal.
- (3) The Tribunal may, on application made to it by the landlord, notice of which has been given to the tenant, approve of the inclusion in a retail shop lease of another form of relocation provision under subsection (1)(b) if the Tribunal is satisfied that special circumstances exist by reason of which such approval ought to be given.
- (4) A landlord in relation to a retail shopping centre may make an application under subsection (3) as to any number of retail shop leases in respect of that centre where the landlord is of the opinion that the same special circumstances exist in relation to each lease the subject of the application, and the Tribunal may exercise its powers under that subsection accordingly.

*[Section 14A inserted by No. 59 of 2011 s. 14.]*

**14B. Landlord's legal costs of lease etc. not claimable from tenant**

- (1) A landlord under a retail shop lease is not able to claim from any person (including the tenant) the landlord's legal or other expenses relating to —
- (a) the negotiation, preparation or execution of —
    - (i) the lease; or
    - (ii) a renewal of the lease; or

- (iii) an extension of the lease;
  - or
  - (b) obtaining the consent of a mortgagee to the lease; or
  - (c) the landlord's compliance with this Act.
- (2) Subsection (1) does not prevent the landlord from claiming the reasonable legal or other expenses incurred by the landlord in connection with an assignment of the lease or a sub-lease, including investigating a proposed assignee or sub-lessee and obtaining any necessary consents to the assignment or sub-lease.

*[Section 14B inserted by No. 59 of 2011 s. 14.]*

**14C. Refit etc. of shop, provision in lease requiring tenant to do is void in some cases**

A provision of a retail shop lease requiring the tenant to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting.

*[Section 14C inserted by No. 59 of 2011 s. 14.]*

**15. Provision in lease excluding Act etc. is void etc.**

- (1) Any provision of a retail shop lease that purports to —
- (a) exclude the application of any provision of this Act; or
  - (b) limit the right of a party to the lease to refer any question arising under the lease to the Tribunal,
- is void.
- (2) A provision of a retail shop lease, to the extent that it is contrary to or inconsistent with anything in this Act or with anything that by this Act the lease is taken to provide, is void.

*[Section 15 amended by No. 48 of 1990 s. 13; No. 55 of 2004 s. 126.]*

## **Part IIA — Unconscionable conduct and misleading or deceptive conduct**

*[Heading inserted by No. 47 of 2006 s. 23; amended by No. 59 of 2011 s. 15.]*

### **Division 1 — Unconscionable conduct**

*[Heading inserted by No. 59 of 2011 s. 16.]*

#### **15A. Terms used**

In this Division —

***applicable industry code***, in relation to a person who is a participant in an industry, means the prescribed provisions of an industry code relating to the industry;

***commencement*** means the commencement of section 23 of the *Retail Shops and Fair Trading Legislation Amendment Act 2006*;

***fit out costs*** includes the costs of providing or installing finishes, fixtures, fittings, equipment and services;

***industry code*** means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

*[Section 15A inserted by No. 47 of 2006 s. 23; amended by No. 59 of 2011 s. 17.]*

#### **15B. Application of Division**

- (1) In addition to a retail shop lease to which or in relation to which this Division would otherwise apply, this Division also applies to or in relation to a retail shop lease that was entered into —
  - (a) before the relevant day; or
  - (b) pursuant to an option granted or agreement made before the relevant day,

if this Act would have applied to the lease had it been entered into on or after that day.

- (2A) In subsection (1) —  
**relevant day** has the meaning given to that term by section 4(3).
- (2) This Division does not apply to conduct that occurred before the commencement.
- (3) Nothing in this Division affects the operation of Division 2.  
*[Section 15B inserted by No. 47 of 2006 s. 23; amended by No. 59 of 2011 s. 18.]*

**15C. Landlord not to engage in unconscionable conduct**

- (1) A landlord under a retail shop lease shall not, in connection with the lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened subsection (1), the Tribunal may have regard to —
- (a) the relative strengths of the bargaining positions of the landlord and tenant; and
  - (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord; and
  - (c) whether the tenant was able to understand any documents relating to the lease; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant (or a person acting on behalf of the tenant) by the landlord or a person acting on behalf of the landlord in relation to the lease; and

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- (e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord; and
- (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code; and
- (i) the extent to which the landlord unreasonably failed to disclose to the tenant —
  - (i) any intended conduct of the landlord that might affect the interests of the tenant; and
  - (ii) any risks to the tenant arising from the landlord's intended conduct that are risks that the landlord should have foreseen would not be apparent to the tenant;and
- (j) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant; and
- (k) the extent to which the landlord acted in good faith; and
- (l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and
- (m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
- (n) the extent to which the landlord required the tenant to incur unreasonable refurbishment or fit out costs.

- (3) In considering whether a landlord has contravened subsection (1), the Tribunal —
- (a) is not to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
  - (b) may have regard to circumstances existing before the commencement but not to conduct engaged in before the commencement.

*[Section 15C inserted by No. 47 of 2006 s. 23.]*

**15D. Tenant not to engage in unconscionable conduct**

- (1) A tenant under a retail shop lease shall not, in connection with the lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a tenant has contravened subsection (1), the Tribunal may have regard to —
- (a) the relative strengths of the bargaining positions of the landlord and tenant; and
  - (b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the tenant; and
  - (c) whether the landlord was able to understand any documents relating to the lease; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the landlord (or a person acting on behalf of the landlord) by the tenant or a person acting on behalf of the tenant in relation to the lease; and

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- (e) the amount for which, and the circumstances under which, the landlord could have granted an identical or equivalent lease to a person other than the tenant; and
  - (f) the extent to which the tenant's conduct towards the landlord was consistent with the tenant's conduct in similar transactions between the tenant and other similar landlords; and
  - (g) the requirements of any applicable industry code; and
  - (h) the requirements of any other industry code, if the landlord acted on the reasonable belief that the tenant would comply with that code; and
  - (i) the extent to which the tenant unreasonably failed to disclose to the landlord —
    - (i) any intended conduct of the tenant that might affect the interests of the landlord; and
    - (ii) any risks to the landlord arising from the tenant's intended conduct that are risks that the tenant should have foreseen would not be apparent to the landlord;and
  - (j) the extent to which the tenant was willing to negotiate the terms and conditions of any lease with the landlord; and
  - (k) the extent to which the tenant acted in good faith; and
  - (l) the extent to which the tenant was not reasonably willing to negotiate the rent under the lease; and
  - (m) the extent to which the tenant unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
  - (n) the extent to which the tenant was willing to incur reasonable refurbishment or fit out costs.
- (3) In considering whether a tenant has contravened subsection (1), the Tribunal —



- (a) is not to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) may have regard to circumstances existing before the commencement but not to conduct engaged in before the commencement.

*[Section 15D inserted by No. 47 of 2006 s. 23.]*

**15E. Conduct that is not unconscionable for s. 15C and 15D**

A person is not to be taken for the purposes of section 15C or 15D to engage in unconscionable conduct in connection with a retail shop lease only because —

- (a) the person institutes legal proceedings in relation to the lease or refers a dispute or claim in relation to the lease to arbitration; or
- (b) the person fails to renew the lease or enter into a new lease; or
- (c) the person does not agree to having an independent valuation of current market rent carried out.

*[Section 15E inserted by No. 47 of 2006 s. 23.]*

**15F. SAT's powers as to unconscionable conduct**

- (1) A landlord or tenant, or former landlord or tenant, under a retail shop lease or former retail shop lease who suffers, or is likely to suffer, loss or damage because of unconscionable conduct of another person that contravenes section 15C or 15D may apply in writing to the Tribunal for an order that the other person pay compensation in respect of the loss or damage, or for other appropriate relief.
- (2) An unconscionable conduct application is required to be lodged within 6 years after the alleged unconscionable conduct occurred.

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- (3) Without limiting section 26, in proceedings in relation to an unconscionable conduct application, the Tribunal may make any one or more of the following orders that it considers appropriate —
- (a) an order that a party to the proceedings pay money to a specified person, whether by way of debt, damages or restitution, or refund any money paid by a specified person;
  - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings.
- (4) The Tribunal may make any ancillary orders that it considers necessary for the purpose of enabling an order under this section to have full effect.
- (5) The Tribunal may impose any conditions that it considers appropriate when making an order under this section.
- (6) The Tribunal may make an interim order under this section pending final determination of an unconscionable conduct application, if the Tribunal considers it appropriate to do so.
- (7) In this section —

*specified*, in relation to an order, means specified in the order.

*[Section 15F inserted by No. 47 of 2006 s. 23; amended by No. 59 of 2011 s. 19.]*

**Division 2 — Misleading or deceptive conduct**

*[Heading inserted by No. 59 of 2011 s. 20.]*

**16A. Term used: misleading or deceptive conduct**

In this Division —

***misleading or deceptive conduct*** means conduct to which section 16C applies.

*[Section 16A inserted by No. 59 of 2011 s. 20.]*

**16B. Application of Division**

- (1) In addition to a retail shop lease to which or in relation to which this Division would otherwise apply, this Division also applies to or in relation to a retail shop lease that was entered into —
- (a) before the relevant day; or
  - (b) pursuant to an option granted or agreement made before the relevant day,

if this Act would have applied to the lease had it been entered into on or after that day.

- (2) In subsection (1) —  
***relevant day*** has the meaning given to that term by section 4(3).
- (3) This Division does not apply to conduct that occurred before the commencement of the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011* section 20<sup>1</sup>.
- (4) Nothing in this Division affects the operation of Division 1.  
*[Section 16B inserted by No. 59 of 2011 s. 20.]*

**16C. Parties to lease not to engage in misleading etc. conduct**

A party to a retail shop lease must not, in connection with the lease, engage in conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease.

*[Section 16C inserted by No. 59 of 2011 s. 20.]*

**16D. SAT's powers as to misleading etc. conduct**

- (1) A party, or former party, under a retail shop lease or former retail shop lease who suffers, or is likely to suffer, loss or damage because of misleading or deceptive conduct of another party or former party to the lease may apply in writing to the Tribunal for an order that the other party, or former party, pay compensation in respect of the loss or damage, or for other appropriate relief.
- (2) A misleading or deceptive conduct application is required to be lodged within 6 years after the alleged misleading or deceptive conduct occurred.
- (3) Without limiting section 26, in proceedings in relation to a misleading or deceptive conduct application, the Tribunal may make any one or more of the following orders that it considers appropriate —
  - (a) an order that a party to the proceedings pay money to a specified person, whether by way of debt, damages or restitution, or refund any money paid by a specified person;
  - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings.
- (4) The Tribunal may make any ancillary orders that it considers necessary for the purpose of enabling an order under this section to have full effect.
- (5) The Tribunal may impose any conditions that it considers appropriate when making an order under this section.
- (6) The Tribunal may make an interim order under this section pending final determination of a misleading or deceptive conduct application, if the Tribunal considers it appropriate to do so.

- (7) In this section —  
*specified*, in relation to an order, means specified in the order.  
*[Section 16D inserted by No. 59 of 2011 s. 20.]*

**Division 3 — Reference of questions to State Administrative Tribunal**

*[Heading inserted by No. 59 of 2011 s. 21.]*

**16. Party to lease may refer question to SAT**

- (1) Subject to section 11(5), a party to a retail shop lease may refer to the Tribunal any question between the parties which he believes to be a question arising under the lease and the Tribunal shall —
- (a) determine whether or not the question referred to the Tribunal is a question arising under the lease; and
  - (b) if it is such a question, hear and determine it.
- (2) The matter for determination referred to in subsection (1)(a) may be determined by the Tribunal in such manner as it thinks fit, subject to each party being given an opportunity to make a written submission.

*[Section 16 inserted by No. 48 of 1990 s. 14; amended by No. 55 of 2004 s. 127; No. 47 of 2006 s. 25; No. 5 of 2008 s. 19.]*

*[17. Deleted by No. 48 of 1990 s. 14.]*

*[18-23. Deleted by No. 55 of 2004 s. 128.]*

**Part III — Powers and procedure for dealing with matters**

*[Heading inserted by No. 5 of 2008 s. 20.]*

**24. Term used: matter**

In this Part —

***matter*** means any application that may be made, or any question or matter that may be referred or submitted, to the Tribunal under this Act.

*[Section 24 inserted by No. 5 of 2008 s. 20.]*

**25A. Resolution of matter using *Small Business Development Corporation Act 1983* s. 15C or 15E, request for**

A person who may, under this Act, make an application, referral or submission to the Tribunal may request the Small Business Commissioner —

- (a) to provide assistance to attempt to resolve the matter under the *Small Business Development Corporation Act 1983* section 15C; or
- (b) to undertake alternative dispute resolution in respect of the matter under the *Small Business Development Corporation Act 1983* section 15E.

*[Section 25A inserted by No. 20 of 2011 s. 32.]*

**25B. Confidential information may be disclosed to Commissioner**

- (1) In this section —

***confidential information***, in relation to a matter, means information given to a person who acts under section 11(3) in the matter.

- (2) A person who has confidential information in relation to a matter that is the subject of a request under section 25A may disclose the information if the Small Business Commissioner so requires.

*[Section 25B inserted by No. 20 of 2011 s. 32.]*

**25C. Commissioner to issue certificate if matter not resolved etc.**

- (1) The Small Business Commissioner must, on the request of a person who may, under this Act, make an application, referral or submission to the Tribunal, issue a certificate to the person if the Commissioner is satisfied that —
  - (a) the matter is unlikely to be resolved with the assistance of alternative dispute resolution; or
  - (b) it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the matter; or
  - (c) alternative dispute resolution has failed to resolve the matter.
- (2) The certificate is to be in a form approved by the Small Business Commissioner and may include any information about the conduct of the parties that the Commissioner considers appropriate in the circumstances.

*[Section 25C inserted by No. 20 of 2011 s. 32.]*

**25D. Application to SAT restricted in certain circumstances**

- (1) An application, referral or submission in respect of a matter may not be made to the Tribunal under this Act unless the Small Business Commissioner has issued a certificate in respect of the matter under section 25C.
- (2) Subsection (1) does not apply in respect of a matter prescribed by the regulations for the purposes of this section.
- (3) Nothing in this section prevents a person from making a request to the Small Business Commissioner under section 25A.

*[Section 25D inserted by No. 20 of 2011 s. 32.]*

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**25E. Commissioner may intervene in SAT proceeding**

The Small Business Commissioner may intervene at any time in a proceeding of the Tribunal in relation to a matter.

*[Section 25E inserted by No. 20 of 2011 s. 32.]*

**25. State Administrative Tribunal Act 2004, relationship of this Part to**

Nothing in this Part prevents a matter from being dealt with through a compulsory conference or mediation process under the *State Administrative Tribunal Act 2004*.

*[Section 25 inserted by No. 5 of 2008 s. 20.]*

**26. SAT's powers to make orders**

(1) Without limiting any power to make an order that is conferred by the *State Administrative Tribunal Act 2004* but subject to this Act the Tribunal may make —

- (a) an order that requires a party to any matter before it to pay money to a person specified in the order; or
- (b) an order for a party to any matter before it to do, or refrain from doing, anything specified in the order; or
- (c) an order dismissing any matter before it.

(1a) The power in subsection (1)(b) includes power for the Tribunal to order the parties to enter into an agreement varying a retail shop lease as specified in the order where the Tribunal has found that the tenant under the lease was before entering into the lease misled by the landlord as to the meaning or effect of a term or condition of the lease.

(1aa) The Tribunal may, where it considers it appropriate to do so to resolve the matter concerned, make an order terminating a retail shop lease.

(2) In considering whether to make an order under the *State Administrative Tribunal Act 2004* section 87(2) in a proceeding,



the Tribunal may have regard to a certificate issued under section 25C that relates to the proceeding.

- (3) An order of the Tribunal requiring anything to be done or discontinued may fix the time within which that thing is to be done or discontinued, as the case may be.
- (4) The Tribunal may allow any equitable claim or defence, and give any equitable remedy, in a matter before it that the Supreme Court may allow or give.

*[Section 26 amended by No. 48 of 1990 s. 20; No. 66 of 1998 s. 11; No. 55 of 2004 s. 129; No. 5 of 2008 s. 21; No. 20 of 2011 s. 33; No. 59 of 2011 s. 22.]*

**27. Both court and SAT having jurisdiction, procedure etc. in case of**

- (1) If both a court and the Tribunal have jurisdiction to determine a matter, proceedings to determine the matter may be instituted either —
  - (a) before the court; or
  - (b) before the Tribunal,but not both.
- (2) If a matter is before a court, the court may order it to be transferred to the Tribunal if —
  - (a) all parties to the matter so agree; or
  - (b) the court, on its own initiative or on the application of a party, decides it is in the interests of justice to do so.
- (3) If a matter is before the Tribunal and is one that a court also has jurisdiction to determine, the Tribunal may order it to be transferred to the court if —
  - (a) all parties to the matter so agree; or

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(b) the Tribunal, on its own initiative or on the application of a party, decides it is in the interests of justice to do so.

(4) Where —

- (a) an unconscionable conduct application or misleading or deceptive conduct application has been made; and
- (b) at the time it was made no issue arising under the application was the subject of civil proceedings before a court,

a court has no jurisdiction to hear or determine such an issue in civil proceedings unless subsection (5) applies.

(5) This subsection applies if —

- (a) an application referred to in subsection (4), or a part of such an application to which the issue referred to in subsection (4) relates, is withdrawn or is dismissed for want of jurisdiction; or
- (b) as a result of judicial review, a court quashes or declares invalid an order, direction or determination of the Tribunal made in respect of the application on the ground that the Tribunal had no jurisdiction to hear and determine that issue.

(6) Where —

- (a) an application referred to in subsection (4) has been made; and
- (b) at the time it was made an issue arising under the application was the subject of civil proceedings before a court,

the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue unless subsection (7) applies.

(7) This subsection applies if —

- (a) the proceedings referred to in subsection (6) are, or the part of those proceedings relating to the issue referred to in that subsection is, transferred to the Tribunal by the court concerned; or
- (b) those proceedings are, or that part of those proceedings is, withdrawn or dismissed by the court, or by another court on appeal in those proceedings, for want of jurisdiction or without deciding the issue on its merits; or
- (c) as a result of judicial review, a court quashes or declares invalid those proceedings or that part of those proceedings or any order, judgment or decision made in those proceedings in relation to the issue, on the ground that the court concerned had no jurisdiction to hear and determine the issue.

*[Section 27 amended by No. 55 of 2004 s. 130; No. 47 of 2006 s. 24; No. 5 of 2008 s. 22; No. 59 of 2011 s. 23.]*

## **Part IV — Miscellaneous**

### **28. Protection from liability for some persons**

A person is not liable in civil proceedings, and the Crown in right of the State is not liable, for any act done or omission made by that person for the purposes of this Act and in good faith in the course of the exercise or purported exercise of a power or duty which he had reasonable and probable cause to believe was conferred or imposed by this Act.

### **29. Transitional provisions (Sch. 1)**

Schedule 1 sets out transitional provisions.

*[Section 29 inserted by No. 59 of 2011 s. 24.]*

### **30A. Small Business Commissioner, functions of**

The Small Business Commissioner has the following functions under this Act —

- (a) to provide assistance to attempt to resolve disputes that arise in respect of retail shop leases;
- (b) to provide information and guidance in respect of retail shop leases or the provisions of this Act.

*[Section 30A inserted by No. 20 of 2011 s. 34.]*

### **30. Regulations**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to the purposes of this Act.
- (2) Regulations made under subsection (1) prescribing standard trading hours for the purposes of section 12(1)(c) may prescribe those standard trading hours generally or in relation to —
  - (a) a specified class or classes of retail shop; or

- (b) a specified part or parts of the State; or
- (c) a specified time or times of the year.

*[Section 30 amended by No. 66 of 1998 s. 12.]*

**31. Review of Act**

- (1) The Minister is to carry out a review of the operation and effectiveness of this Act within 6 months after the expiration of every 5 years from the commencement of section 1 of the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998*<sup>1</sup>.
- (2) The Minister is to prepare a report based on each review made under subsection (1) and cause the report to be laid before each House of Parliament within 12 months after the commencement of that review.

*[Section 31 inserted by No. 66 of 1998 s. 13.]*

## **Schedule 1 — Transitional provisions**

[s. 29]

*[Heading inserted by No. 59 of 2011 s. 25.]*

### **Division 1 — Preliminary**

*[Heading inserted by No. 59 of 2011 s. 25.]*

#### **1. Interpretation Act 1984 not affected**

This Schedule does not affect the operation of the *Interpretation Act 1984* Part V.

*[Clause 1 inserted by No. 59 of 2011 s. 25.]*

#### **2. Transitional regulations**

- (1) Regulations may prescribe all matters that are required or necessary or convenient to be prescribed for dealing with any issue or matter of a savings or transitional nature —
  - (a) that arises as a result of the amendment of this Act by another Act (an *amending Act*); and
  - (b) for which there is no sufficient provision in this Act or the amending Act.
- (2) Regulations made under this clause may provide that specified provisions of this Act do not apply, or apply with modifications specified in the regulations, to or in relation to any matter.
- (3) Regulations made under this clause may provide that a state of affairs specified in the regulations is to be taken to have existed, or not to have existed, on and from a day that is earlier than the day on which the regulations come into operation but not earlier than the day on which the relevant amending Act, or the relevant provision or provisions of that Act, came into operation.
- (4) If the regulations contain a provision referred to in subclause (3), the provision does not operate so as —
  - (a) to affect in a manner prejudicial to any person (other than the State), the rights of that person existing before the regulations commenced; or

- (b) to impose liabilities on any person (other than the State) in respect of anything done or omitted to be done before the regulations commenced.

*[Clause 2 inserted by No. 59 of 2011 s. 25.]*

**Division 2 — Provisions for *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011***

*[Heading inserted by No. 59 of 2011 s. 25.]*

**3. Terms used**

In this Division —

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

**commencement day**, in relation to a provision of this Act referred to in clause 4, means the day on which —

- (a) the provision of the 2011 amending Act that inserted the provision referred to in clause 4 came into operation; or
- (b) the provision of the 2011 amending Act that amended the provision referred to in clause 4 came into operation;

**existing lease** means a lease that —

- (a) immediately before the commencement of the 2011 amending Act section 5, was not a retail shop lease within the meaning of this Act as in force at that time; and
- (b) was entered into —
  - (i) before the commencement of the 2011 amending Act section 5; or
  - (ii) pursuant to an option granted or agreement made before the commencement of the 2011 amending Act section 5;

**existing retail shop lease**, in relation to a provision of this Act referred to in clause 4, means a retail shop lease that was entered into —

- (a) before the commencement day; or

**Commercial Tenancy (Retail Shops) Agreements Act 1985**

**Schedule 1** Transitional provisions

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Agreements Amendment Act 2011

**cl. 4**

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- (b) pursuant to an option granted, whether directly or by operation of section 13, or agreement made before the commencement day.

*[Clause 3 inserted by No. 59 of 2011 s. 25.]*

**4. Application of 1985 Act to existing retail shop lease**

Despite the amendments effected by the 2011 amending Act —

- (a) the following provisions do not apply to, or in relation to, an existing retail shop lease —
  - (i) section 12(3A) of this Act as inserted by section 10(4) of the 2011 amending Act;
  - (ii) sections 14A and 14C of this Act, as inserted by section 14 of the 2011 amending Act; and

and

- (b) the following provisions continue to apply to, and in relation to, an existing retail shop lease —
  - (i) section 6 of this Act, as in force immediately before being amended by section 7 of the 2011 amending Act; and
  - (ii) section 13 of this Act, as in force immediately before being amended by section 11 of the 2011 amending Act.

*[Clause 4 inserted by No. 59 of 2011 s. 25.]*

**5. 1985 Act does not apply to existing lease that becomes retail shop lease on 1 Jan 2013**

This Act does not apply to, or in relation to, an existing lease that, immediately after the commencement of the 2011 amending Act section 5, is a retail shop lease within the meaning of this Act as in force at that time.

*[Clause 5 inserted by No. 59 of 2011 s. 25.]*



**6. No contracting out**

This Division applies despite an agreement to the contrary between the parties to a retail shop lease whether or not the agreement is contained in the retail shop lease.

*[Clause 6 inserted by No. 59 of 2011 s. 25.]*



### Notes

<sup>1</sup> This is a compilation of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* and includes the amendments made by the other written laws referred to in the following table<sup>1a</sup>. The table also contains information about any reprint.

### Compilation table

Short title	Number and year	Assent	Commencement
<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	43 of 1985	13 May 1985	s. 1 and 2: 13 May 1985; Act other than s. 1 and 2: 1 Sep 1985 (see s. 2 and <i>Gazette</i> 30 Aug 1985 p. 3065)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act (No. 2) 1985</i>	49 of 1985	28 Oct 1985	1 Sep 1985 (see s. 2)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990</i> <sup>2</sup>	48 of 1990	30 Nov 1990	30 Nov 1990 (see s. 2)
<b>Reprint of the <i>Commercial Tenancy (Retail Shops) Agreements</i> as at 27 Sep 1991</b> (includes amendments listed above)			
<i>Acts Amendment (Franchise Fees) Act 1997 Pt. 3</i>	56 of 1997	12 Dec 1997	31 Jan 1998 (see s. 2 and <i>Gazette</i> 30 Jan 1998 p. 577)
<i>Lotteries Commission Amendment Act 1998 s. 23</i>	26 of 1998	30 Jun 1998	22 Jul 1998 (see s. 2 and <i>Gazette</i> 21 Jul 1998 p. 3825)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998</i> <sup>3</sup>	66 of 1998	15 Jan 1999	s. 1 and 2: 15 Jan 1999; Act other than s. 1 and 2: 1 Jul 1999 (see s. 2 and <i>Gazette</i> 18 Jun 1999 p. 2629)
<i>Acts Amendment and Repeal (Financial Sector Reform) Act 1999 s. 65</i>	26 of 1999	29 Jun 1999	1 Jul 1999 (see s. 2(1) and <i>Gazette</i> 30 Jun 1999 p. 2905)

**Reprint of the *Commercial Tenancy (Retail Shops) Agreements* as at 21 Jul 2000**  
(includes amendments listed above)

**Commercial Tenancy (Retail Shops) Agreements Act 1985**

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Corporations (Consequential Amendments) Act 2001</i> Pt. 12 and s. 220	10 of 2001	28 Jun 2001	15 Jul 2001 (see s. 2 and <i>Gazette</i> 29 Jun 2001 p. 3257 and <i>Cwlth Gazette</i> 13 Jul 2001 No. S285)
<i>Taxation Administration (Consequential Provisions) Act 2002</i> s. 10 <sup>4</sup>	45 of 2002	20 Mar 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 27 Jun 2003 p. 2383)
<i>Acts Amendment (Equality of Status) Act 2003</i> Pt. 5	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
<i>State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004</i> Pt. 2 Div. 21 <sup>5,6</sup>	55 of 2004	24 Nov 2004	1 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7130)
<i>Planning and Development (Consequential and Transitional Provisions) Act 2005</i> s. 15	38 of 2005	12 Dec 2005	9 Apr 2006 (see s. 2 and <i>Gazette</i> 21 Mar 2006 p. 1078)
<i>Retail Shops and Fair Trading Legislation Amendment Act 2006</i> Pt. 3	47 of 2006	4 Oct 2006	11 May 2007 (see s. 2 and <i>Gazette</i> 11 May 2007 p. 2017)
<b>Reprint 3: The Commercial Tenancy (Retail Shops) Agreements as at 8 Jun 2007</b> (includes amendments listed above)			
<i>Acts Amendment (Justice) Act 2008</i> Pt. 4	5 of 2008	31 Mar 2008	30 Sep 2008 (see s. 2(d) and <i>Gazette</i> 11 Jul 2008 p. 3253)
<i>Small Business and Retail Shop Legislation Amendment Act 2011</i> Pt. 3	20 of 2011	11 Jul 2011	24 Mar 2012 (see s. 2(b) and <i>Gazette</i> 23 Mar 2012 p. 1363)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011</i>	59 of 2011	14 Dec 2011	s. 1 and 2: 14 Dec 2011 (see s. 2(a)); Act other than s. 1 and 2: 1 Jan 2013 (see s. 2(b) and <i>Gazette</i> 30 Nov 2012 p. 5773)

**Reprint 4: The Commercial Tenancy (Retail Shops) Agreements as at 18 Jan 2013**  
(includes amendments listed above)

~~<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.~~

**Provisions that have not come into operation**

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Statutes (Repeals and Minor Amendments) Act 2014 s. 14<sup>7</sup></i>	17 of 2014	2 Jul 2014	<del>To be proclaimed</del> <a href="#">6 Sep 2014</a> (see s. 2(b)) and <a href="#">Gazette 5 Sep 2014 p. 3213</a>

<sup>2</sup> The *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990* s. 22 reads as follows:

**22. Saving and transitional**

- (1) Subject to subsection (2), an amendment made to the principal Act by a provision of this Act does not apply to or in relation to a retail shop lease entered into before the day on which that provision comes into operation and the provisions of the principal Act as in force prior to the coming into operation of that provision shall continue to apply to and in relation to any such lease as if this Act had not been passed.
- (2) The amendments made to the principal Act by the provisions of sections 4(a)(i), (b) and (c), 5(c), 6(a), (c) and (d)(ii), 8(b), 10(a), (b), (d), (e), (g) and (i), 11, 14, 15, 18(a), 19 and 21 of this Act apply to and in relation to a retail shop lease to which the principal Act applies entered into before or after the coming into operation of those provisions.
- (3) Subsections (1) and (2) apply notwithstanding an agreement to the contrary between parties to a retail shop lease to which the principal Act applies, whether or not such agreement is contained in the retail shop lease.
- (4) In this section *retail shop lease* has the same meaning as it has in the principal Act.

<sup>3</sup> The *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998* s. 14 reads as follows:

**14. Saving and transitional**

(1) In this section —

**existing lease** in relation to a provision of this Act means a retail shop lease entered into —

- (a) before the coming into operation of that provision; or
- (b) pursuant to an option granted in a retail shop lease entered into before the coming into operation of that provision,

but does not include a retail shop lease to which the provision does not apply by reason of section 4 of the principal Act;

**new lease** in relation to a provision of this Act means a retail shop lease entered into on or after the coming into operation of that provision and —

- (a) includes an extension of the term of a retail shop lease entered into before the coming into operation of that provision if the extension is granted on or after the coming into operation of that provision; but
- (b) does not include a retail shop lease so entered into pursuant to an option granted in a retail shop lease entered into before the coming into operation of that provision;

**retail shop lease** has the same meaning as it has in the principal Act.

(2) Subject to subsection (3), the principal Act as amended by a provision of this Act applies only to and in relation to a new lease and the principal Act applies to and in relation to an existing lease as if that provision had not been enacted.

(3) Each of —

- (a) section 3(1) of the principal Act as amended by section 4(1)(a) of this Act, only in relation to the insertion of the definition of “accountant”;
- (b) section 3(3) of the principal Act as inserted by section 4(2) of this Act;
- (c) section 11(3a) of the principal Act as inserted by section 7(3) of this Act;
- (d) section 11(5) of the principal Act as amended by section 7(4) of this Act; and
- (e) section 11(6) and (7) of the principal Act as inserted by section 7(5) of this Act,

applies to and in relation to an existing lease and a new lease.

- (4) This section applies despite an agreement to the contrary between the parties to a retail shop lease whether or not the agreement is contained in the retail shop lease.
- (5) This section does not affect the operation of section 22(1) of the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990*.

<sup>4</sup> The *Taxation Administration (Consequential Provisions) Act 2002* s. 3 and 4 and Pt. 4 are transitional provisions that are of no further effect.

<sup>5</sup> The *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* Pt. 5, the *State Administrative Tribunal Act 2004* s. 167 and 169, and the *State Administrative Tribunal Regulations 2004* r. 28 and 42 deal with certain transitional issues some of which may be relevant for this Act.

<sup>6</sup> The *State Administrative Tribunal Regulations 2004* r. 29 is a transitional provision.

<sup>7</sup> ~~On the date as at which this compilation was prepared, the *Statutes (Repeals and Minor Amendments) Act 2014* s. 14 had not come into operation. It reads as follows:~~

~~**14. Commercial Tenancy (Retail Shops) Agreements Act 1985 amended**~~

~~(1) This section amends the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.~~

~~(2) In section 3 in the definition of *accountant* delete paragraphs (b) and (c) and insert:~~

~~(b) CPA Australia Ltd; or~~

~~(c) the Institute of Public Accountants;~~