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WESTERN AUSTRALIA

COMMERCIAL TENANCY (RETAIL
SHOPS) AGREEMENTS ACT 1985

ARRANGEMENT

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WESTERN AUSTRALIA

COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985

AN ACT to regulate commercial tenancy agreements relating to certain shops, to provide for the determination of questions arising under such agreements, and for connected purposes.

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PART I — PRELIMINARY

Short title

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

Commencement

2. This Act shall come into operation on a day to be fixed by proclamation.¹

Interpretation

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

“**accountant**” means a member of either the Institute of Chartered Accountants of Australia or the Australian Society of Accountants;

“**building**” includes any structure;

“**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;

“key-money” means —

- (a) money that is to be paid to, or at the direction of, a landlord or his agent, by way of a premium, non-repayable bond or otherwise; or
- (b) any benefit that is to be conferred on, or at the direction of, a landlord or his agent,

in connection with the granting, renewal or assignment of a lease or the sub-leasing 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;

“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;

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“Registrar” means the Commercial Registrar under the *Commercial Tribunal Act 1984*;

“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; and
- (b) any premises not situated in a retail shopping centre that are used wholly or predominantly for the carrying on of —
 - (i) a business involving the sale of goods by retail; or
 - (ii) a specified business,

but does not include premises used wholly or partly for the carrying on of a business involving the retail sale of petroleum products as defined in section 47G of the *Transport Co-ordination Act 1966*² for use in road vehicles as so defined, other than premises used for that purpose by a tenant under a lease from a landlord who is not a party to a franchise agreement within the meaning of that expression in the *Petroleum Retail Marketing Franchise Act 1980* of the Parliament of the Commonwealth;

“retail shop lease” means a lease that provides for the occupation of a retail shop other than where —

- (a) the retail shop has a floor area that exceeds 1000 square metres; or
- (b) the lease is held by a corporation within the meaning of the *Companies (Western Australia) Code*³ that would not be eligible to be incorporated in Western Australia as a proprietary company, or that is held by a subsidiary of such a corporation;

“retail shopping centre” means a collection of premises —

(a) 5 or more of which are used wholly or predominantly for the carrying on of —

(i) a business involving the sale of goods by retail; or

(ii) a specified business; and

(b) all of which have, or upon being leased would have, a common head lessor,

but does not include a multi-level building except in relation to each floor of the building on which is situated a collection of premises in respect of which paragraphs (a) and (b) apply;

“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;

“the 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;

“Tribunal” means the Commercial Tribunal of Western Australia established under the *Commercial Tribunal Act 1984*.

(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

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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 question arising —

(a) in relation to any communication, including a disclosure statement under section 6, between the parties to the lease, prior to the lease being entered into, which was material to the terms and conditions of the lease; or

(b) in relation to the lease under a provision of this Act.

(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.]

Application

4. (1)⁴ 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) Sections 16 to 21 apply to and in relation to a retail shop lease whether or not it was entered into as mentioned in subsection (1), but sections 22 and 27 have 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.

Crown bound

5. This Act binds the Crown.

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PART II — RETAIL SHOP LEASES

Disclosure

6. (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 contains false or misleading information, 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 omission of the landlord to give a disclosure statement in accordance with subsection (4) or of 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) repealed]

(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.]

Rent based on turnover

7. (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

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(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 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 net amount of discounts reasonably and properly allowed to any customer in the usual course of business;
- (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;
- (c) the amount of uncollected credit accounts written off by the tenant;
- (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;
- (e) the amount of any instalment of purchase moneys refunded to customers where a lay-by transaction is cancelled;
- (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;
- (g) the amount of delivery charges;
- (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;

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- (i) the price of merchandise returned to shippers, wholesalers or manufacturers;
- (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, game of lotto, or soccer football pool within the meaning of those expressions in the definition of "lottery" in section 4 (1) of the *Lotteries (Control) Act 1954*⁵, 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 under Part III by the Tribunal.

Turnover figures not generally required

8. (1) A provision in a retail shop lease —

- (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.

Key money and goodwill

9. (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;

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- (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 in the Tribunal or a court of competent jurisdiction as a debt due.

[Section 9 amended by No. 48 of 1990 s.6.]

Assignment and sub-leasing

10. (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.

(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 or a person claiming through him may recover from a tenant, who assigns the lease in accordance with this section, any monies that are payable under the lease by the tenant to whom the lease has been assigned is void.

[Section 10 inserted by No. 48 of 1990 s.7.]

Rent review

11. (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 the basis on which or the formula by which the review is to be made.

(2) Where a retail shop lease provides for the review during the currency of the lease of the amount of rent payable under the lease having regard to the market rent of the premises, the market rent shall, for that purpose, be taken to be the rent obtainable at the time of the review in a free and open market if the premises were unoccupied and offered for rental for a use permitted by, and on the same terms as are contained in, the current lease.

(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 either —

- (a) a person licensed under the *Land Valuers Licensing Act 1978* agreed to by each of the parties; or
- (b) 2 persons licensed under that Act, one of whom is appointed by the landlord and one of whom is appointed by the tenant.

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(4) A person who acts under subsection (3) (a) or (b) 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 Registrar for resolution 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) (a) or (b) and the leave of the Registrar has been obtained,

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

[Section 11 amended by No. 48 of 1990 s.8.]

Contribution to landlord's expenses

12. (1) Where provision is made in a retail shop lease for payment by the tenant, in addition to rent, of all or any of the expenses of the landlord in operating, repairing, or maintaining a building of which the retail shop the subject of the lease forms a part or where the retail shop is in a retail shopping centre, that building and the common area —

- (a) the amount payable by the tenant thereunder is limited to the items of expense that the lease specifies are to be paid wholly or in part by the tenant and does not include an amount in respect of which the lease does not specify both —
 - (i) how the amount is to be determined and, where applicable, apportioned to the tenant; and

(ii) how and when the amount is to be paid by the tenant;

(b) the 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 expenses in respect of any 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 expense in respect of that year; and

(ii) the landlord is required to furnish to the tenant, within 3 months after the termination of the year to which the expenses relate, an annual statement of expenditure incurred under each item of expenses specified in accordance with paragraph (a) (i) audited by an accountant.

(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 amortization of all or part of the costs of or incidental to —

(a) the construction of the retail shopping centre;

(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.

[Section 12 amended by No. 48 of 1990 s.9.]

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Right to at least 5 years' tenancy

13. (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 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 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.

(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 90 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 Registrar, having regard to the term of the lease or such other circumstances as he 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 Registrar 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 Registrar, 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 Registrar has not been decided by the time of such expiry; and where the Registrar 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

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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;
- (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,

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 to which subsection (1) applies is not entitled to determine the lease before the expiry of the term that may be obtained by the tenant under that subsection, except —

- (a) by reason of default by the tenant or failure of the tenant to remedy any such default in accordance with the lease;
- (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;
- (c) under and in accordance with a provision that is included in the lease with the approval in writing of the Registrar given under subsection (7) or (7a); or
- (d) where the Registrar has granted an application by the tenant under subsection (7b).

(7) The Registrar may, upon application made to him 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 at a time that is before the expiry of the term that may be obtained by the tenant under subsection (1) otherwise than for a reason mentioned in subsection (6) (a) or (b) if he 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 Registrar may exercise his powers under that subsection accordingly.

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(7b) The Registrar may, on application in writing by a tenant or prospective tenant, order that an option of renewal does not arise under subsection (1), if he 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.

(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.]

Avoidance prevented

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

- (a) the landlord under a retail shop lease holds the premises concerned under a head lease with which it would be inconsistent for the retail shop lease to continue until the day provided for by section 13 (1);

- (b) the head lessor and the head lessee under the head lease are related within the meaning given to that expression by subsection (4); and
- (c) the continuation of the retail shop lease as referred to in paragraph (a) would be consistent with the interest of the head lessor in the premises concerned,

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

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

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

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

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

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

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- (b) one of them is, by section 7 (5) of the *Companies (Western Australia) Code*³, deemed, for the purposes of that Code, to be related to the other;
- (c) one of them is a corporation within the meaning given to that term by the *Companies (Western Australia) Code*³ and the other —
 - (i) is an officer, within the meaning given to that term by the *Companies (Western Australia) Code*³, of that corporation;
 - (ii) is a shareholder of, or holds a beneficial or contingent interest in a share in, that corporation;
 - (iii) is a discretionary or other beneficiary of a trust, the trustee of which is a shareholder of, or holds a beneficial interest in a share in, that corporation; or
 - (iv) is, or is the spouse of, a lineal descendant of a grandparent of a person described by subparagraph (i), (ii) or (iii);
- (d) one of them is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the other in relation to the premises the subject of the head lease;
- (e) one of them is —
 - (i) an employee; or
 - (ii) an agent, a principal, a partner, a nominee, a solicitor, an accountant or an auditor,of the other or of a person bearing to the other any of the relationships mentioned in subparagraph (ii);

- (f) one of them is —
 - (i) a trustee for the other; or
 - (ii) a trustee of a trust of which the other is a discretionary or other beneficiary.

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

[Section 13A inserted by No. 49 of 1985 s.5; amended by No. 48 of 1990 s.11.]

Notices as to renewal of leases

13B. (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.

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(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.

(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.]

Compensation by landlord

14. 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;
- (b) takes any action that would substantially alter or inhibit the flow of customers to the retail shop;
- (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;
- (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.

Act prevails

15. (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 Registrar,

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.]

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PART III — DETERMINATION OF QUESTIONS

Reference of questions to Registrar

16. (1) Subject to section 11 (5), a party to a retail shop lease may refer to the Registrar any question between the parties which he believes to be a question arising under the lease and the Registrar shall —

- (a) determine whether or not the question referred to him is a question arising under the lease; and
- (b) if it is such a question, hear the question with a view to achieving a solution acceptable to the parties to the lease.

(2) The matter for determination referred to in subsection (1) (a) —

- (a) may be determined by the Registrar in such manner as he thinks fit, subject to each party being given an opportunity to make a written submission; and
- (b) for the purposes of sections 22 (f) and 27, is deemed to be a question referred to the Registrar.

[Section 16 inserted by No. 48 of 1990 s.14.]

[17. Repealed by No. 48 of 1990 s.14.]

Records

18. (1) Notwithstanding anything to the contrary provided under any Act, rule or practice, an official record of evidence given before the Registrar in the course of any hearing under section 16 (1) (b) shall not be made in any case but the Registrar may make such notes of evidence as he requires.

(2) Notes of evidence made by the Registrar are not part of the record of a reference to the Registrar.

(3) In relation to hearings under section 16 (1) (b), the record of the Registrar consists of —

- (a) particulars of the question referred to him, as completed by the party referring the question to the Registrar;
- (b) the notation of the nature of the question as ascertained and recorded by the Registrar during the hearing; and
- (c) the result of the hearing.

(4) The record mentioned in subsection (3) kept by the Registrar shall be open for inspection free of charge by the parties to the proceeding to which the record relates and their authorized representatives, and shall be available for production before the Tribunal or a court for the purposes of any proceeding before the Tribunal or court.

(5) Evidence of anything said or any admission made at a hearing under section 16 (1) (b) is not admissible in proceedings before the Tribunal or any court but nothing in this subsection prevents any such evidence being admitted in a further hearing under section 16 (1) (b).

[Section 18 amended by No. 48 of 1990 s.15.]

Reference to Registrar

19. (1) A question arising under a retail shop lease is referred to the Registrar by a party to the lease completing the prescribed form and lodging it, together with the prescribed fee, at the office of the Registrar.

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(2) The Registrar shall ensure that a person is given such assistance as may be required in completing the form prescribed for the purposes of subsection (1).

(3) Each party to a reference before the Registrar shall have the carriage of his own case and is not entitled to be represented by an agent unless —

(a) the party is a body corporate, in which case it may appear by a representative approved by the Registrar; or

(b) in any other case, the Registrar, being of the opinion that an agent should be permitted to represent the party, approves of the party being so represented.

(4) A person who has a legal qualification under the laws of this State or any other place or who is of the nature of a professional advocate is not eligible to represent a party to a reference before the Registrar except where the Registrar, being aware that the person would otherwise be ineligible by reason of this subsection, gives his consent.

(5) The hearing of a reference before the Registrar shall not be open to the public.

[Section 19 amended by No. 48 of 1990 s.16.]

Notice of hearing

20. (1) The Registrar shall give or cause to be given to each person appearing to the Registrar to have a sufficient interest in a resolution of the question that has been referred to the Registrar reasonable notice of the time when, and the place where, the Registrar is to conduct a hearing of the reference.

(2) Every person given notice under subsection (1) is a party to the reference and every person who satisfies the Registrar or the Tribunal, as the case may be, that he has a sufficient interest in a resolution of a question before the Registrar or the Tribunal is entitled to be, and shall be, joined as a party.

(3) The Registrar may by service of a summons in writing require any person who is a party to a reference to attend, at a time and place specified in the summons, at the hearing of the question referred to the Registrar.

(4) A person who has been served with a summons under subsection (3) and fails without reasonable excuse, proof of which lies on him, to comply with the summons commits an offence and is liable to a fine not exceeding \$1000.

[Section 20 amended by No. 48 of 1990 s.17.]

Mediation agreements

21. (1) Where a question has been referred to the Registrar and a solution in the form of an agreement acceptable to all of the parties to the reference has been attained, particulars of the agreement shall be reduced to writing and signed by or on behalf of the parties, and a copy thereof shall be filed in the records of the Registrar.

(2) The failure by a party to an agreement, a copy of the particulars of which has been filed under subsection (1), to comply with any term of the agreement within the time therein specified or, if no time is so specified, within 2 months after that copy was so filed constitutes a breach of the terms of the agreement.

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Reference to Tribunal

22. Where under this Act a question is referred to the Registrar and —

- (a) the Registrar is of the opinion that the reference was made frivolously, vexatiously, or for an improper purpose;
- (b) the Registrar is of the opinion that a solution acceptable to all of the parties to the reference cannot be attained by means of a hearing, or any further hearing, under section 16 (1) (b);
- (c) a party to the reference, having been duly notified of the hearing of the reference, whether or not he has been served with a summons under section 20 (3), fails to attend the hearing;
- (d) a party to the reference who has entered into an agreement a copy of the particulars of which has been filed under section 21 (1) breaches the terms of the agreement;
- (e) the question has not been resolved within 90 days after the question was referred to the Registrar; or
- (f) the Registrar is of the opinion that because of the importance or complexity of the question, or for any other reason, the question ought to be determined by the Tribunal,

the Registrar shall, by notice in writing in the prescribed form, forthwith refer the matter to the Tribunal for determination.

[Section 22 amended by No. 48 of 1990 s.18.]

Constitution of Tribunal

23. (1) For the purposes of the exercise by the Tribunal of the jurisdiction conferred on it by this Act, the Minister shall establish —

- (a) a panel of persons representative of the interests of persons who are landlords under retail shop leases; and
- (b) a panel of persons representative of the interests of persons who are tenants under retail shop leases,

and the provisions of the *Commercial Tribunal Act 1984* apply to and in relation to those panels as if they were established under section 6 (1) (a) and (b), respectively, of that Act.

(2) In subsection (1), “**the Minister**” means the person who is the Minister for the purposes of the *Commercial Tribunal Act 1984*.

(3) When exercising the jurisdiction conferred on it by this Act, the Tribunal shall be constituted in accordance with the *Commercial Tribunal Act 1984* as if the panels established under subsection (1) (a) and (b) were, respectively, panels established for the purposes of this Act under section 6 (1) (a) and (b) of that Act.

Jurisdiction of Tribunal

24. Subject to this Act, the Tribunal has jurisdiction to hear and determine —

- (a) an application by a tenant for an order under section 6 (1) (b) or 14;
- (b) a debt action by a tenant under section 9 (3); and

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- (c) a matter referred to it by the Registrar under section 22.

[Section 24 inserted by No. 48 of 1990 s.19.]

Additional powers of Tribunal

25. The Tribunal may make or cause to be made such investigations as it thinks fit for the purposes of determining any matter before it, but nothing in this section shall be taken to limit any other power of the Tribunal.

Orders of Tribunal

26. (1) Without limiting any power to make an order that is conferred by the *Commercial Tribunal Act 1984* but subject to this Act the Tribunal may make —

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

(2) Where the parties to proceedings before the Tribunal agree to settle any question in issue in the proceedings, the Tribunal may, with the consent of the parties, make an order disposing of the question in accordance with the terms agreed.

(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) Where the Registrar refers a matter to the Tribunal under section 22 (a), the Tribunal may deal with the matter under the *Commercial Tribunal Act 1984* as if the proceedings before it had been instituted by the party from whose reference to the Registrar the matter arises.

[Section 26 amended by No. 48 of 1990 s.20.]

Other jurisdictions

27. (1) Where this Act provides for the reference of a question to the Registrar and the question is one that a court also has jurisdiction to determine, proceedings may be instituted to determine the question either —

- (a) before the court; or
- (b) by way of a reference to the Registrar,

but not both.

(2) Where proceedings are instituted in, or are before, a court for the determination of a question that, but for subsection (1), could be referred to the Registrar the question shall —

- (a) if all parties to the proceedings so agree; or
- (b) if the court of its own motion or on the application of a party so directs,

be transferred to the Registrar and shall be disposed of as if the question had been referred to the Registrar under this Act.

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(3) Where a question has been referred to the Registrar under this Act and the question is one that a court also has jurisdiction to determine, the proceedings for the determination of the question shall —

- (a) if all the parties to the proceedings so agree; or
- (b) if, on the application of a party or of his or its own motion, the Registrar or, where the matter has been referred by the Registrar to the Tribunal under section 22, the Tribunal so directs,

be transferred to the court and shall be disposed of as if the proceedings had been instituted before the court.

PART IV - MISCELLANEOUS

Protection

28. 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.

Annual reports

29. (1) The Registrar shall cause to be prepared annually a report to the Minister relating to —

- (a) the discharge of the duties of the Registrar under section 16; and
- (b) the exercise by the Tribunal of the jurisdiction conferred on it by this Act,

bringing to notice matters that he considers to be significant concerning the relationship between parties to retail shop leases.

(2) The Minister shall cause a copy of each report made under subsection (1) to be laid before each House of Parliament as soon as practicable after he receives the report.

[Section 29 amended by No. 48 of 1990 s.21.]

Regulations

30. 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.

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Review of Act

31. (1) As soon as practicable after the expiration of the period of 5 years following the coming into operation of this Act the Minister shall cause an investigation and review to be conducted, and a report to be prepared, as to the need for this Act to continue in operation.

(2) The Minister shall cause a copy of the report prepared for the purposes of subsection (1) to be laid before each House of Parliament as soon as practicable after it is completed.

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NOTES

1. This reprint is a compilation as at 27 September 1991 of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* and includes all amendments effected by the other Acts referred to in the following Table.

Table of Acts

Act	Number and Year	Assent	Commencement	Miscellaneous
<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	43 of 1985	13 May 1985	1 September 1985 (see <i>Gazette</i> 30 August 1985 p.3065)	
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act (No. 2) 1985</i>	49 of 1985	28 October 1985	1 September 1985 (see section 2)	
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990</i>	48 of 1990	30 November 1990	30 November 1990	Section 22 Saving and transition ⁴

² Short title (as changed by section 5 of the *Acts Amendment and Repeal (Transport Co-ordination) Act 1985*) substituted under section 7 (3) (h) of the *Reprints Act 1984*.

³ In respect of matters arising after 1 January 1991, the operation of the *Companies (Western Australia) Code* is subject to the provisions in Division 2 of Part 13 of the *Corporations (Western Australia) Act 1990*.

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⁴ Section 22 of No. 48 of 1990 reads as follows —

“ **Saving and transitional**

22. (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.

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⁵ Now see the *Lotteries Commission Act 1990*.