



Western Australia

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

**Reprinted as at 24 November 2000**



Western Australia

# Commercial Tenancy (Retail Shops) Agreements Regulations 1985

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Western Australia

Reprinted under the  
*Reprints Act 1984* as  
at 24 November 2000

Commercial Tenancy (Retail Shops) Agreements Act 1985

## Commercial Tenancy (Retail Shops) Agreements Regulations 1985

### 1. Citation

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

### 2. Commencement

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

### 3. Interpretation

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

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

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

- (a) drycleaning;

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

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

**4. Disclosure statement by landlord**

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

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

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

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

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

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

*[Regulation 5A inserted in Gazette 18 June 1999 pp.2601-2.]*

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

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

**7. Reference to Registrar under section 19(1)**

A reference to the Registrar under section 19(1) of the Act of a question arising under a retail shop lease shall be in the form of

Form 4 and the fee payable on the lodging of the form at the office of the Registrar shall be \$29.00.

*[Regulation 7 amended in Gazette 18 June 1999 p.2602.]*

**8. Reference to Tribunal under section 22**

A notice under section 22 of the Act referring a matter to the Tribunal shall be in the form of Form 5.

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

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

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

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**Schedule  
Forms**

**FORM 1**

*Commercial Tenancy (Retail Shops) Agreements Act 1985*  
Section 6(4)

[Reg 4]

**DISCLOSURE STATEMENT**

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

**WARNING TO TENANT**

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

**Signing any of those documents will legally bind the tenant.**

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

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

**PART A**

**LANDLORD'S DISCLOSURE TO PROSPECTIVE TENANT**

**CENTRE/BUILDING DETAILS:**

Name of Centre/Building.....

Address of Centre/Building.....

.....

Current Number of Shops

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



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

Current Total Lettable Area of Centre/Building

Current Parking Facilities

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

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

*(Delete if not applicable)*

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

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

Outstanding orders of Statutory or Local Authorities affecting the premises	<b>YES</b>	<b>NO</b>
Changes physically affecting the Centre/Building of which Statutory or Local Authorities have notified the Landlord, or of which the Landlord is aware	<b>YES</b>	<b>NO</b>
Alterations to the Centre/Building submitted to or approved by Statutory and Local Authorities and proposed to be commenced within the term of the Lease or any statutory or contractual option	<b>YES</b>	<b>NO</b>
Redevelopment clause in Lease	<b>YES</b>	<b>NO</b>

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Total or Partial Destruction clause  
in Lease **YES NO**

The premises meet all current  
health, safety, building and  
fire regulations for the  
proposed use **YES NO NOT  
KNOWN**

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

Core trading hours of  
the Centre/Building

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

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

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

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

Permitted use of the common areas  
for trading **YES NO**

If permitted, on the following basis  
Current tenant mix with retail  
classifications (*floor plan attached*)

Compulsory contributory  
membership of Merchants'  
Association **YES NO**

Date on which contributions to  
Association commence



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Water supply and waste  
Other:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

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

**YES NO**

*(If yes, details are attached).*

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

**YES NO**

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

**4. Rent**

Date on which rent payments commence

**Frequency**

Annual rent at commencement

.....

Frequency of rent reviews

.....

Period

Basis for review

.....

.....

.....

.....

.....

.....

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

Rent payable by reference to turn-over

**YES NO**

If yes, basis of calculation

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

*which includes a requirement for the Tenant to disclose his or her trading figures to the Landlord.*

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

Abatement of rent on destruction or damage	<b>YES</b>	<b>NO</b>
5. <u>Operating Expenses</u> (Contributions to Landlord's expenses)		
Operating expenses payable by the Tenant	<b>YES</b>	<b>NO</b>
Date on which operating expenses payments commence.....	<b>Frequency</b> .....	
Percentage of the total operating expenses cost apportioned to the premises	.....	
Current annual contribution of the premises to the budget attached	<b>Approximately \$</b> .....	
Currency of operating expenses year	From.....to.....	

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

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

6. Additional Charges payable by the Tenant  
*(Delete if not applicable)*  
 Costs following Tenant's default  
 Grease trap cleaning  
 Interest on outstanding money  
 Legal fees for Landlord and for Tenant  
 Pre-payment of rent or operating expenses

**Schedule**

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Security and air conditioning (for  
after hours operation)

Stamp duty

Wet waste removal

Other:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

7. Landlord's Interest

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

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

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

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

GENERAL

List of other agreements between —  
the Prospective Tenant and the Landlord  
or  
representations made by the Landlord

\_\_\_\_\_

**PART B**

PROSPECTIVE TENANT'S REQUIREMENTS DISCLOSED TO  
LANDLORD

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

*(Delete if not applicable)*

After hours access

Air conditioning

Air control

Cool rooms/freezers

Dedicated parking bays

Delivery access

Drainage  
External equipment  
Fire protection  
Floor loading  
Hot/cold water  
Power/lighting  
Security  
Shop fit-out  
Telephone/facsimile/radio  
Tenancy cleaning  
Wall loading  
Wet/dry waste

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

**DECLARATION BY LANDLORD AND PROSPECTIVE TENANT**

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

Name of Landlord:

Address of Landlord:

Signed by or on behalf of the Landlord:

Date:

Name of Prospective Tenant:

Address of Prospective Tenant:

Signed by or on behalf of the Prospective Tenant:

Date:

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**FORM 2**

*Commercial Tenancy (Retail Shops) Agreements Act 1985*

Section 7(1)(a)

[Reg. 5]

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

TO .....

.....

.....

(Full name and address of the landlord)

1. Where retail shop is in a retail shopping centre —  
.....  
(Name and address of retail shopping centre)  
.....  
(Number of the retail shop)

or

2. Where the retail shop is not in a retail shopping centre —  
.....  
(Address of retail shop)

3. Where the tenant has entered into occupation of the retail shop —  
.....  
(the business name under which the tenant conducts business)

I,.....  
(Full name of tenant)

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

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

Dated:

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

\* Strike out whichever does not apply.



FORM 3

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 13(1)

[Reg. 6]

NOTICE OF EXERCISE OF OPTION

TO .....  
of.....

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

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

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

.....  
(Number of retail shop)

or

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

.....  
(Address of retail shop)

3.

.....  
(Business name under which tenant conducts business)

I,.....

(Full name of tenant)

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

being the tenant of the abovenamed retail shop under —

(a) a lease dated .....,  
between.....

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

and (where applicable)

(b) an assignment of lease dated .....  
between .....

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

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

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

Date: .....

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

FORM 4

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 19(1)

[Reg 7]

REFERENCE OF A QUESTION ARISING UNDER  
A RETAIL SHOP LEASE

TO — THE COMMERCIAL REGISTRAR  
OF THE COMMERCIAL TRIBUNAL  
OF WESTERN AUSTRALIA

The matter set out below is referred to the Commercial Registrar for mediation with a view to the Landlord/Lessor and the Tenant/Lessee attaining a solution to their dispute that is acceptable to them.

1. The Applicant is either (1)\* The Landlord/Lessor or (2)\* The Tenant/Lessee.  
\*Delete whichever is not applicable.
2. State the full name/s, residential address/es and occupation/s of the Landlord/Lessor (if a natural person) or full name and address of Principal Office in Western Australia of the Landlord/Lessor (if a body corporate)

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Name of contact person \_\_\_\_\_

Telephone No. of contact person \_\_\_\_\_

*NOTE: The Landlord/Lessor is usually not the managing agent. Do not insert under item 2 the name of the managing agent unless the managing agent is also the Landlord/Lessor. If you do not know who the Landlord/Lessor is, or are not sure, you should do a Title Search (ie. ownership search) of the property at the Titles Office in Perth. It is your responsibility to accurately advise the name and address of the Landlord/Lessor.*

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3. State the full name/s, residential address/es and occupation/s of the Tenant/Lessee (if a natural person) or full name and address of Principal Office in Western Australia of the Tenant/Lessee (if a body corporate)

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Name of contact person \_\_\_\_\_

Telephone No. of contact person \_\_\_\_\_

4. State the name and address of the retail shopping centre. (*Answer this item only if the dispute relates to a tenancy in a retail shopping centre, otherwise state "Not Applicable"*)

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5. If the dispute relates to a tenancy in a retail shopping centre, state

Shop number (*if applicable*) \_\_\_\_\_

Lettable floor area of Tenant's shop \_\_\_\_\_

Lettable floor area of retail shopping centre (*if applicable*) \_\_\_\_\_

6. If the retail shop tenancy is not in a retail shopping centre, state:

The address of the retail shop \_\_\_\_\_

The area of the retail shop  
(ie. the area leased) \_\_\_\_\_

7. State the questions that relate to the matter(s) in dispute and which you are now referring to the Commercial Registrar, together with all relevant facts and circumstances, and forward all relevant documents, including the lease, any agreement for lease, letters, consents and brochures (*photocopies are acceptable provided they are clearly legible*), assignment of lease, variations of lease, any relevant statement(s) by any third party who has knowledge of any matter material to resolving the matter(s) in dispute and, where relevant, a search of the relevant Certificate of Title and where the tenancy is in a retail shopping centre, a

plan of the retail shopping centre, with the location of the retail shop coloured in. The nature of the matter(s) referred for mediation should be set forth in brief, but clear language, together with your advice as to how you believe the matter the subject of the mediation may be reasonably resolved to the satisfaction of both the Landlord/Lessor and the Tenant/Lessee — i.e. the results that you think will be reasonable to obtain.

\* \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. I forward with this application the prescribed fee of \$ \_\_\_\_\_  
(Cheques are to be made payable to the Ministry of Justice).  
Date: \_\_\_\_\_

.....  
Signature of Applicant (or if the Applicant is a body corporate, the signature of a person duly authorised by the body corporate to sign this application).

\*NOTE: If there is insufficient space, continue on A4 paper and cross reference to the relevant item number(s) stated on this form.

**INFORMATION FOR APPLICANT**

The following definitions are extracted from the *Commercial Tenancy (Retail Shops) Agreements Act 1985*. They are for your information and may assist you in completing your application to the Commercial Registrar —

“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

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(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;

**“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;

**“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;

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

(a) the total retail floor area to which that lease applies (including, in the case of a building with 2 or more floor levels, the area of every floor level or part thereof to which that lease applies) exceeds 1 000 square metres;

(b) the lease is held by a corporation within the meaning of the Companies (Western Australia) Code <sup>2</sup> 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 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 petrol or diesel

to be used to propel vehicles on public roads, 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 shopping centre”** means a cluster 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 —
  - (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*,

whether the premises are in a single storey building or a multi-level building;

**“specified business”** means a business of a kind prescribed by the regulations to be a specified business. (*these are drycleaning, hairdressing, beauty therapy, shoe repair, and sale or rental of video tapes*)

Your attention is also drawn to section 3(3) of the Act, relating to “a question arising under a retail shop lease”. Section 3(3) of the Act reads as follows —

- “3. (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;
  - (b) a question whether or not a lease is or was a retail shop lease;
  - (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

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- 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;
- (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;
  - (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. ”.



FORM 5

Commercial Tenancy (Retail Shops) Agreements Act 1985

Section 22

TO THE COMMERCIAL TRIBUNAL OF WESTERN AUSTRALIA

Pursuant to section 19(1) of the Commercial Tenancy (Retail Shops) Agreements Act 1985, ("the Act"), ..... of ..... referred to me on ..... a matter relating to a question arising under a retail shop lease.

Annexed hereto and marked with the letter "A" is a copy of the prescribed form referred to in section 19(1) of the Act, containing the subject matter of the referral, a copy of all notices given under section 20 of the Act and a copy of all other documents and papers relating to the referral.

- \* I am of the opinion that the reference was made frivolously, vexatiously or for an improper purpose.
\* I am of the opinion that a solution acceptable to all of the parties to the reference cannot be attained by means of a hearing/\* any further hearing, under section 17 of the Act.
\* A party to the reference, having been duly notified of the hearing of the reference, failed to attend the hearing.
\* A party to the reference and who entered into an agreement, a copy of the particulars of which has been filed under section 21(1) of the Act, has breached the terms of the agreement.
\* The question referred was not resolved within 90 days after it was referred to me.

Pursuant to section 22 of the Act I HEREBY refer the question referred to me to the Commercial Tribunal for its determination.

Date: .....

COMMERCIAL REGISTRAR

\* Delete those that are not applicable.

.....  
**TENANT GUIDE**

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

**TO THE NEW TENANT (“LESSEE”)**

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

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

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

<p><b>A lease provision that is contrary to the provisions of the Act has no effect (“void”).</b></p>
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To make sure you understand your obligations, liabilities and rights before entering into the lease you should:

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

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

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### **ADVICE BEFORE ENTERING THE LEASE**

The Act provides that your retail lease will “commence” either —  
When you take possession of the keys to the shop premises; or  
When you commence paying rent; or  
When both parties sign the lease.

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

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

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

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

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

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

### **DISCLOSURE STATEMENT (s.6)**

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

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

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

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

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

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

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

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

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

The Lessor doesn’t have to lease the shop premises if it appears that a business will not add value to the property investment. Your disclosure, like the Lessor’s, must be correct and contain no misleading information. Otherwise, the Lessor could institute legal proceedings against you outside the provisions of the Act.

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

**TENANT GUIDE (s.6A)**

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

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

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

### **PREMISES COVERED BY THE ACT (s.3)**

#### **Generally**

- The Act covers a retail shop where the premises are being used wholly or predominantly for a business involving the sale of goods by retail. However other premises trading in a retail shopping centre ( where there are 5 or more retail shops) are also covered by the Act.
- The Act and its requirements only apply to retail shop leases when the shops have a retail floor area that does not exceed 1 000m<sup>2</sup> .

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

#### **Specifically**

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

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

### **TERM OF THE RETAIL SHOP LEASE (s.13)**

#### **Minimum of 5 years**

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

#### **Can be longer... or shorter**

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

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**Fixed period**

A lease is for a fixed period.

**At the end of the lease...**

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

**Options in the lease**

It is in your commercial interests to ensure that any options you hold to extend your occupancy are recorded by you allowing a sufficient lead time to exercise the option by the date set out in the terms of the lease. That option will lapse unless you inform the Lessor that you wish to renew your lease (exercising your option) in the manner and timeframe as set out in the lease document.

**STRUCTURING YOUR LEASE**

**Assume you won't be able to renew**

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

Therefore you should:

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

**Does the lease include redevelopment or relocation clauses?**

Commercial and retail property investments need to be constantly promoted. This can involve redevelopment of premises with works by the Lessor that can

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

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

**Can the Act help?**

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

**RENT REVIEW (s.11)**

**Only use one method of review at a time**

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

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

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

**Can use a different method next time**

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

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**No “ratchet” clauses**

In a rent review your rent can not be held above the current market level (via a ratchet clause) such that the rent can never fall or go below a fixed level. The lease must allow your rent to rise or fall to a level supported by market evidence.

**The role of the Act and the Registrar**

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

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

In the case of disagreement the new rent may be referred to the Commercial Registrar for determination.

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

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

**Steps needed to base the rent on turnover**

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

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

**CONTRIBUTION TO LANDLORD EXPENSES (s.12)**

**Only “operating” expenses not “capital” expenses**

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



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

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

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

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

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

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

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

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

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

**NOTE:** Rental agreements are generally —

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

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

**Audit and accounting standards – Lessors obligations**

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

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**Lessor to provide estimates and statements**

In “net” lease arrangements, the Act provides that you will not have to pay a contribution to the Lessor’s operating expenses until one month after the Lessor provides you with an annual estimate of expenditure for each operating expense. The Lessor is also required to supply you with an audited operating expenses statement within 3 months after the previous accounting period has ended. If this is not done you do not have to contribute to the Lessor’s operating expenses until you have received the audited statement.

**SINKING FUNDS (s.12A)**

**Act protects your contributions**

If your retail shop is in a shopping centre and you have agreed to contribute to a fund for major repair and maintenance works, your contributions are protected under the Act. These moneys are subject to accounting and audit provisions with no funds being able to be expended on capital works. These are the rightful responsibility of the Lessor and would include the construction of new extensions and the replacement of major plant and equipment.

**OTHER FUNDS AND RESERVES (s.12B)**

**Other contributions are also protected**

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

**HOURS OF OPERATION (s.12C)**

**Your opening hours are flexible**

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

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

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**STANDARD TRADING HOURS AND THE COSTS OF OPERATION**

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

**NOTE:** “Standard Trading Hours” are prescribed as —  
(a) 8.00 a.m. to 6.00 p.m. Monday, Tuesday, Wednesday and Friday;  
(b) 8.00 a.m. to 9.00 p.m. Thursday; and  
(c) 8.00 a.m. to 5.00 p.m. Saturday.  
(see regulation 5A.)

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

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

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

**ASSIGNMENT AND SUB-LEASING (s.10)**

**Your responsibilities if you sell or sub-lease your business**

If you choose to sell your business during the term of your lease, you (as the Assignor) and any guarantor to your lease can not be held liable for the performance of the ingoing tenant (the Assignee) or for any moneys including any rent owed by the ingoing tenant from the assignment date.

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

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

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

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**VOID CLAUSES (s.15)**

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

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

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

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

**COMPENSATION BY LANDLORD (s.14)**

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

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

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

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

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

**The Act may be able to help...**

If you cannot resolve a dispute over any aspect of your retail shop lease with the Lessor or through the Lessors property agents, the Act authorises the Commercial Registrar to deal with these disputes as “a question arising”. Either the lessee or the lessor may initiate this action with the Registrar by submitting the information required by Form 4 (Regulation 7) and payment of the prescribed fee (*as at 1 July 1999, this was \$29*).

**...informally.**

The Act sets out an informal dispute resolution procedure before the Registrar, as a mediator, to achieve solutions that are quick and inexpensive to the parties (s.16). The Registrar can determine, for example, rent reviews (s.11) and shop relocation agreements (s.13).

**..formally.**

The Commercial Tribunal can deal with more complex matters that are referred to it by the Registrar (s.22). This is the recommended course before any Court action is contemplated by the parties.

Advice in such matters can be obtained from solicitors with property experience, the SBDC, industry sources, tenant advocates and retail representative groups.
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**To avoid disputes, get everything in writing**

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

- ◆ customer traffic numbers;
- ◆ exclusive rights to sell product lines;

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- ◆ other tenancies as competitors;
- ◆ the existence and continuance of major tenants in the centre, and
- ◆ marketing support by the Lessor and related costs.

*[Schedule amended in Gazette 3 May 1991 p.1954; 16 February 1993 pp.1269-79; 18 June 1999 pp.2602-26.]*

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**Notes**

- <sup>1</sup> This reprint is a compilation as at 24 November 2000 of the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and includes the amendments referred to in the following Table.

**Table of Regulations**

<b>Citation</b>	<b>Gazettal</b>	<b>Commencement</b>	<b>Miscellaneous</b>
<i>Commercial Tenancy (Retail Shops) Agreements Regulations 1985</i>	30 August 1985 pp.3121-27	1 September 1985 (see regulation 2 and <i>Gazette</i> 30 August 1985 p.3065)	
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 1991</i>	3 May 1991 p.1954	3 May 1991	
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 1992</i>	16 February 1993 pp.1269-79	16 February 1993	
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Regulations 1999</i>	18 June 1999 pp.2601-26	1 July 1999 (see regulation 2)	

- <sup>2</sup> 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* (No. 105 of 1990).