

Western Australia

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

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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.

Part I — Preliminary

1. Short title

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

2. Commencement

This Act shall come into operation on a day to be fixed by proclamation¹.

3. Interpretation

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

“**accountant**” means a member of —

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

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

“**building**” includes any structure;

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

by way of a premium or something of a like nature in consideration of the granting of, or agreeing to grant, a lease or the renewal of a lease or the consenting to an assignment of a lease or the sub-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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“management fees” means fees in respect of costs for or incidental to the collection of rent or other moneys or the management of premises including, but not limited to, such of those costs —

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

“retail floor area”, in relation to a retail shop, means the floor area of the retail shop designed and available for use for the carrying on of business in the retail shop;

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

“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;

“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;

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“total lettable area”, in relation to a retail shopping centre, means the aggregate of the retail floor areas of the retail shops (or areas set aside for retail shops) in the retail shopping centre;

“Tribunal” means the State Administrative Tribunal.

- (2) Where the parties to a retail shop lease enter into, either before or after entering into the retail shop lease, a written or oral agreement or arrangement that contains a provision which if contained in the retail shop lease would be void, that provision is for the purposes of this Act deemed to be contained in the retail shop lease and this Act applies to and in relation to that provision as if it were so contained.
- (3) A reference in this Act to a question arising under a retail shop lease includes a reference to —
- (a) a question whether or not a lease exists or has existed;
 - (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 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.
- (4) For the purposes of this Act a retail shop lease is entered into when —
- (a) under the retail shop lease, the tenant enters into possession of, or commences to pay rent in respect of, the premises the subject thereof; or
 - (b) where the retail shop lease is in writing, all of the parties thereto have signed the retail shop lease,

whichever first occurs.

[Section 3 amended by No. 49 of 1985 s.3; No. 48 of 1990 s.4; No. 56 of 1997 s.24; No. 66 of 1998 s.4; No. 10 of 2001 s.38; No. 55 of 2004 s. 117.]

4. Application³

- (1) Subject to subsection (2), this Act does not apply to or in relation to a retail shop lease that was entered into —
 - (a) before the relevant day; or
 - (b) pursuant to an option granted or agreement made before the relevant day.
- (2) Section 16 applies to and in relation to a retail shop lease whether or not it was entered into as mentioned in subsection (1), but section 27 has no effect in relation to a question arising under a retail shop lease if it was entered into as mentioned in subsection (1).
- (3) In this section “**the relevant day**”, in relation to a retail shop lease, means the day on which this Act comes into operation or,

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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.

[Section 4 amended by No. 55 of 2004 s. 118.]

5. Crown bound

This Act binds the Crown.

Part II — Retail shop leases

6. Disclosure

- (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.

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- (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.]

6A. Tenant guide

- (1) Where a retail shop lease is entered into and the retail shop lease does not incorporate a tenant guide in accordance with subsection (4), the tenant may, in addition to exercising any other right, do either or both of the following —
- (a) within 60 days after the lease was entered into, give to the landlord written notice of termination of the lease;
 - (b) apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of the failure to incorporate the tenant guide in the retail shop lease in accordance with subsection (4).
- (2) Where the tenant under a retail shop lease gives to the landlord a notice of termination under subsection (1) the lease terminates upon the expiry of a period of 14 days after the notice was given.
- (3) In addition to exercising the tenant's rights under subsection (1)(b), the tenant may, after the expiry of the period referred to in subsection (1)(a), apply in writing to the Tribunal for an order that the retail shop lease be terminated.
- (4) The tenant guide shall be in the prescribed form and located in the prescribed position in the retail shop lease.
- (5) Where the tenant under a retail shop lease (in this subsection referred to as “**the outgoing tenant**”) assigns the lease to another person (in this subsection referred to as “**the incoming tenant**”), nothing in this section gives to the incoming tenant a

right to terminate the lease that the outgoing tenant would not have had if he or she had continued as the tenant under the lease.

- (6) The tenant guide is not required to be included —
- (a) on the renewal of a retail shop lease under an option (including the option arising by reason of section 13(1)); or
 - (b) on the assignment of a retail shop lease.

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

7. Rent based on turnover

- (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 nett 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;
 - (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

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- (k) receipts from sales of tickets in any lottery within the meaning of that term in the *Lotteries Commission Act 1990*, other than amounts derived as commission or fees from those sales.
- (5) Where by reason of this section, a provision of a retail shop lease to the effect that rent is to be determined either in whole or in part by reference to the turnover of the business is void, the rent shall be as is agreed in writing between the parties or determined under Part III by the Tribunal.

[Section 7 amended by No. 26 of 1998 s.23.]

8. Turnover figures not generally required

- (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.

9. Key-money and goodwill

- (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;
 - (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.

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- (3) Any amount paid or the value of any benefit conferred by a person under a provision of a lease that is void by reason of subsection (1) or (1a) may be recovered by that person from the person to whom the amount was paid or on whom the benefit was conferred upon an application to the Tribunal for an order that the money sought be paid or in a court of competent jurisdiction as a debt due.

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

10. Assignment and sub-leasing

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

are payable under the lease by the tenant to whom the lease has been assigned is void.

(5) In this section —

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

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

“moneys payable under the lease” includes moneys recoverable by action under the lease.

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

11. Rent review

- (1) A provision in a retail shop lease for review of the amount of rent payable under the lease during the currency of the lease is void unless the lease specifies, in respect of each occasion on which the review is to be made, a single basis on which the review is to be made.
- (2) If a retail shop lease provides for the review during the currency of the retail shop lease of the amount of rent payable under the retail shop lease having regard to the market rent of the retail shop concerned —
 - (a) that market rent shall, for that purpose, be taken to be the rent obtainable at the time of that review in a free and open market as if, all the relevant factors, matters or variables used in proper land valuation practice having been taken into account, that retail shop were vacant and to let on similar terms as are contained in the current retail shop lease;
 - (b) unless specific provision is made in the retail shop lease for the time at which a review may be initiated, a party

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to the retail shop lease may not more than 3 months before the date on which that review is to be carried out and not more than 6 months after that date, initiate the review by notice in writing served on the other party to the retail shop lease; and

- (c) a provision in the retail shop lease purporting to preclude the increase or reduction of that market rent or to limit the extent to which that market rent may be increased or reduced is void.
- (2a) A provision in a retail shop lease purporting to preclude the tenant from voluntarily disclosing the rent under the lease is void.
- (3) A retail shop lease that provides for review of the amount of rent payable during the currency of the lease shall be taken to provide that where the parties do not agree on the rent payable as a result of the review, the question shall be resolved, subject to subsection (5), by 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.
- (3a) If the parties to a retail shop lease referred to in subsection (3) do not agree on the rent payable as a result of the review concerned, the rent payable immediately before that review shall not be increased or reduced before the question is resolved or determined under this section, but nothing in this subsection prevents any increase or reduction in rent which takes place after that resolution or determination from being due and payable with effect from the date of that review.
- (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 Tribunal for determination a question as to the rent payable as a result of the review by the parties where —
- (a) the persons acting under subsection (3)(b) fail to reach an agreement on the rent to be paid; or
 - (b) a person has not acted under subsection (3)(a) or (b) and the leave of the Tribunal has been obtained,

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

[(6), (7) repealed]

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

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

12. Contribution to landlord's expenses

- (1) If provision is made in a retail shop lease for payment by the tenant, in addition to rent, of all or any of the operating expenses of the landlord —
- (a) the amount payable by the tenant under the retail shop lease is limited to the items of operating expenses that the retail shop lease specifies are to be paid wholly or in part by the tenant and does not include an amount in respect of which the retail shop lease does not specify both —
 - (i) how that amount is to be determined and, when applicable, apportioned to the tenant; and
 - (ii) how and when that amount is to be paid by the tenant;

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- (b) the proportion of those operating expenses payable by the tenant under the retail shop lease shall not be greater than the relevant proportion without the approval of the Tribunal;
- (c) where —
 - (i) the premises the subject of the retail shop lease are adjacent to, or form a cluster with, one or more other premises which have or, on being leased, would have a common head lessor and are grouped together for the purpose of allocating to each of those premises a portion of operating expenses; and
 - (ii) any part of the operating expenses is expenditure incurred as a result of some only of the premises in the cluster being open outside the standard trading hours,

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

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

of operating expenses to which the tenant is required to contribute.

- (1a) An operating expenses statement —
- (a) is to be given to the tenant within 3 months after the end of the accounting period to which it relates;
 - (b) if the relevant retail shop is in a retail shopping centre, must include a statement of the current total lettable area of the retail shopping centre and details of any material change in that total lettable area during the period to which the statement relates;
 - (c) is to be prepared in accordance with relevant principles and disclosure requirements of the applicable accounting standards made by the Australian Accounting Standards Board, as in force from time to time;
 - (d) may be a composite statement (that is, it may relate to more than one tenant) if each tenant to which it relates is able to ascertain from the statement the information required by subsection (1)(d)(ii) that is relevant to that tenant; and
 - (e) is to be accompanied by a report on the statement prepared by a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth which includes a statement by the auditor as to whether or not the operating expenses statement correctly states expenditure by the landlord during the accounting period concerned in respect of operating expenses to which the tenant is required to contribute, and as to whether or not the total amount of estimated operating expenses for that period (as shown in the estimate of operating expenses given to the tenant) exceeded the total actual expenditure by the landlord in respect of those operating expenses during that period.

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- (1b) The landlord shall bear half of the cost of an audit referred to in subsection (1a)(e) and the other half of that cost shall be borne by —
- (a) the tenant to whose premises that audit relates; or
 - (b) if there is more than one tenant to whose premises that audit relates, jointly in the relevant proportions.
- (1c) An operating expenses statement is not required to be accompanied by an auditor's report if the statement does not relate to any operating expenses other than land tax (unless subsection (1g) applies), water, sewerage and drainage charges, local government rates and charges or insurance premiums and it is accompanied by copies of assessments, invoices, receipts or other proof of payment in respect of all expenditure by the landlord referred to in subsection (1)(d)(ii).
- (1d) If a landlord does not comply with the requirement referred to in subsection (1)(d)(ii), the tenant is not obliged to pay, and the landlord is not entitled to recover, operating expenses from the date of that noncompliance until the landlord complies with that requirement.
- (1e) A tenant under a retail shop lease in respect of premises in a retail shopping centre —
- (a) is not liable to contribute towards an operating expense of the landlord that is not specifically referable to any particular retail shop in the retail shopping centre unless the shop is one of the shops to which the operating expense is referable; and
 - (b) is not liable to contribute an amount in excess of an amount calculated by multiplying the total amount of that operating expense by the proportion that the retail floor area of the shop bears to the aggregate of the retail floor areas of all the retail shops in the retail shopping centre to which the operating expense is referable.
- (1f) If there is a provision in a retail shop lease in respect of any premises to the effect that the tenant is obliged to make a

payment to or for the benefit of the landlord for management fees, the landlord is not entitled to recover, and the tenant is not obliged to make, that payment.

(1g) If provision is made in a retail shop lease for payment by the tenant of all or any of the land tax or metropolitan region improvement tax imposed in relation to the land on which the retail shop is situated it is a term of that retail shop lease that the tenant shall only be obliged to pay, and the landlord shall only be able to recover, whether directly or indirectly, from the tenant in relation to that land —

(a) where the premises the subject of the retail shop lease comprise the whole of the land, the notional land tax imposed; and

(b) where the premises the subject of the retail shop lease do not comprise the whole of the land, the relevant proportion of the notional land tax imposed.

(2) A provision in a retail shop lease in respect of premises in a retail shopping centre to the effect that the tenant is obliged to make a payment to or for the benefit of the landlord, whether by way of contribution to a sinking fund or otherwise, for or in respect of the amortisation of all or part of the costs of or incidental to —

(a) the construction of the retail shopping centre;

(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.

(3) In this section and section 12A —

“land tax” means tax imposed by the *Land Tax Act 2002*;

“metropolitan region improvement tax” means metropolitan region improvement tax under the *Planning and Development Act 2005*;

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“notional land tax” means land tax and metropolitan region improvement tax calculated on the basis that the land on which the tax is assessed is the only land of which the landlord is the owner within the meaning of that term in the *Land Tax Assessment Act 2002*;

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

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

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

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

“relevant proportion”, in relation to a retail shop, means —

- (a) where the retail shop is situated in a retail shopping centre, the proportion that the retail floor area of the retail shop bears to the total lettable area of the retail shopping centre at the commencement of the accounting year; or
- (b) where the retail shop is adjacent to, or forms a cluster with, one or more other premises which have or, on being leased, would have a common head lessor and are grouped together for the purpose of allocating to each of those premises a portion of an item of

operating expenses, the proportion that the retail floor area of the retail shop bears to the total lettable area of the premises in the cluster at the commencement of the accounting year;

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

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

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

12A. Sinking funds

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

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approval of the scheme of repayment referred to in paragraph (e);

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

- (ii) submit the scheme of repayment to the Tribunal for approval under subsection (4).
- (4) The Tribunal is to examine a scheme of repayment submitted under subsection (3)(e)(ii) and may approve the scheme or require such amendments to be made to the scheme as the Tribunal thinks fit and the landlord is to repay to each former tenant the amount set forth in the scheme of repayment or amended scheme of repayment, as the case requires.
- (5) A landlord is only liable for a deficiency under subsection (3)(d) in respect of a claim for that deficiency notified to the landlord by the tenant within a period of 3 years following the receipt by the tenant of the copy of the report of the auditor referred to in subsection (3)(c)(iv) disclosing the deficiency.
- (6) If a landlord does not comply with the requirement referred to in subsection (3)(c)(iv), the tenant is not obliged to pay, and the landlord is not entitled to recover, payments to the sinking fund from the date of that noncompliance until the landlord complies with that requirement.
- (7) In this section and in section 12B —
- “bank”** means —
- (a) an ADI (authorised deposit-taking institution) as defined in section 5 of the *Banking Act 1959* of the Commonwealth; or
 - (b) a bank constituted by a law of a State, a Territory or the Commonwealth;

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

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

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12B. Contribution to other funds and reserves by tenants

- (1) This section applies if provision is made in a retail shop lease in respect of premises in a retail shopping centre for payments to be made by the tenant into a fund (other than a fund referred to in section 12A) or a reserve for marketing or promotion of the retail shopping centre or any similar purpose.
- (2) The purpose of the fund or reserve is to be specified in the retail shop lease.
- (3) The lease shall be taken to provide that —
 - (a) the landlord is to, as soon as practicable, pay amounts paid by the tenant for the credit of the fund or reserve into one or more appropriately designated interest bearing accounts held by the landlord with a bank in the State;
 - (b) the landlord may only apply amounts standing to the credit of the fund or reserve and interest earned on the fund or reserve for —
 - (i) the purpose mentioned in subsection (2);
 - (ii) taxes and imposts payable on the fund or reserve;
 - (iii) the cost of an audit referred to in paragraph (c)(iii); and
 - (iv) accounting, legal and other professional costs reasonably incurred in the preparation and approval of the scheme of repayment referred to in paragraph (e);
 - (c) the landlord is to —
 - (i) keep full and accurate accounts of all money received or held by the landlord in respect of the fund or reserve;
 - (ii) keep the accounts in such manner that they can be conveniently and properly audited;

- (iii) at the end of each accounting year cause the accounts to be audited by an auditor who is a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth; and
 - (iv) within 3 months after the end of each accounting year deliver a copy of that report to the tenant;
 - (d) subject to subsection (5), the landlord is liable to pay into the fund or reserve any deficiency attributable to the failure by the landlord or any predecessor in title of the landlord to comply with paragraph (a) or (b); and
 - (e) if the retail shopping centre is destroyed, demolished or ceases to operate the landlord is to —
 - (i) prepare a scheme of repayment detailing —
 - (I) the amount standing to the credit of the fund or reserve (including any interest earned on the fund or reserve);
 - (II) the proportion of that amount to which each former tenant is entitled; and
 - (III) the way in which the landlord proposes to distribute that amount;
 - and
 - (ii) submit the scheme of repayment to the Tribunal for approval under subsection (4).
- (4) The Tribunal is to examine a scheme of repayment submitted under subsection (3)(e)(ii) and may approve the scheme or require such amendments to be made to the scheme as the Tribunal thinks fit and the landlord is to repay to each former tenant the amount set forth in the scheme of repayment or amended scheme of repayment, as the case requires.
- (5) A landlord is only liable for a deficiency under subsection (3)(d) in respect of a claim for that deficiency notified to the landlord by the tenant within a period of 3 years following the receipt by

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the tenant of the copy of the report of the auditor referred to in subsection (3)(c)(iv) disclosing the deficiency.

- (6) If a landlord does not comply with the requirement referred to in subsection (3)(c)(iv), the tenant is not obliged to pay, and the landlord is not entitled to recover, payments to the fund or reserve from the date of that noncompliance until the landlord complies with that requirement.

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

12C. Hours of operation

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

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

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

13. Right to at least 5 years' tenancy

- (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 Tribunal, having regard to the term of the lease or such other circumstances as it considers relevant, approves in a particular case; but
 - (b) is not exercisable while there exists any unremedied default under the lease on the part of the tenant notice of

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which has been given by the landlord, in writing, to the tenant.

- (3a) Notwithstanding subsection (3), where a party to a retail shop lease has referred to the Tribunal a question as to whether there is an unremedied default under the lease by the tenant (being a default of which written notice has been given by the landlord to the tenant), the Tribunal, after considering all the circumstances of the case, may determine, by written notice to each party, that the tenant is not required to exercise the option referred to in subsection (3) before the expiry of the current term or the option term, as the case may be, if the question referred to the Tribunal has not been decided by the time of such expiry; and where the Tribunal makes that determination and the question is not decided by the time of such expiry, the current term or the option term, as the case requires, is deemed to be extended —
- (a) if the question is decided in favour of the landlord, to the time when the question is decided; or
 - (b) if the question is decided in favour of the tenant, to a period ending 7 days after the tenant receives notification of the decision,

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

- (3b) Where the current term or the option term of a lease has been extended under subsection (3a)(b) and the tenant exercises the option referred to in subsection (3) during the period of the extension, the lease is deemed to have been renewed for a term commencing immediately after the time when the current term or the option term, as the case may be, would have expired if it had not been so extended.
- (4) Where —
- (a) the landlord under a retail shop lease holds the premises concerned under a head lease;

- (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;

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- (c) under and in accordance with a provision that is included in the lease with the approval in writing of the Tribunal given under subsection (7) or (7a); or
 - (d) where the Tribunal has granted an application by the tenant under subsection (7b).
- (7) The Tribunal may, upon application made to it by the landlord notice of which has been given to the tenant, approve of the inclusion in a retail shop lease of a provision under which the landlord may determine the lease 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 it is satisfied that special circumstances exist by reason of which such approval ought to be given.
- (7a) A landlord in relation to a retail shopping centre may make an application under subsection (7) as to any number of retail shop leases in respect of that centre where he is of the opinion that the same special circumstances exist in relation to each lease the subject of his application, and the Tribunal may exercise its powers under that subsection accordingly.
- (7b) The Tribunal may, on application in writing by a tenant or prospective tenant, order that an option of renewal does not arise under subsection (1), if it is satisfied that —
 - (a) the application was made by the tenant or prospective tenant of his own free will; and
 - (b) the circumstances of the case warrant the granting of the application.
- (8) Where the tenant under a retail shop lease assigns the lease, the term to which the assignee becomes entitled is the balance of the term of the assigning tenant, determined as provided by the lease including, where applicable, the option arising under subsection (1), as at the date of the assignment.

- (9) Notwithstanding any other written law, the right of a tenant under subsection (1) is not affected by any assignment or other disposition of the reversion of the premises to which the lease relates.
- (10) For the purposes of this section and notwithstanding section 68 of the *Transfer of Land Act 1893*, an option in a retail shop lease for the tenant to renew the lease is exercisable against any person with a reversionary interest in the premises the subject of the lease whether or not the lease is registered or protected by caveat.

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

13A. Avoidance prevented

- (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 Tribunal and Part III applies in relation to the hearing and the agreement or determination of the matter as if —

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- (a) the question were a question arising under a retail shop lease; and
 - (b) the parties to the head lease and, where the person referring the question to the Tribunal is not a party to the head lease, that person were the parties to the retail shop lease.
- (3) The Tribunal may, upon application made to it by the head lessor notice of which has been given to the head lessee and the tenant, determine that there are bona fide commercial reasons, other than the desire to avoid the operation of any provision of section 13, for the head lease and the provisions thereof giving rise to the inconsistency referred to in subsection (1)(a) and, if the Tribunal so determines, subsection (1) is of no effect in relation to that head lease.
- (4) For the purposes of this section the head lessor and the head lessee under a head lease are related if —
- (a) one of them is, or is the spouse or de facto partner of, a lineal descendant of a grandparent of the other;
 - (b) one of them is a related body corporate of the other within the meaning of the *Corporations Act 2001* of the Commonwealth;
 - (c) one of them is a corporation within the meaning of the *Corporations Act 2001* of the Commonwealth and the other —
 - (i) is an officer, within the meaning of the *Corporations Act 2001* of the Commonwealth, 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 or de facto partner of, a lineal descendant of a grandparent of a person described by subparagraph (i), (ii) or (iii);
- (d) one of them is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the other in relation to the premises the subject of the head lease;
- (e) one of them is —
 - (i) an employee; or
 - (ii) an agent, a principal, a partner, a nominee, a solicitor, an accountant or an auditor, of the other or of a person bearing to the other any of the relationships mentioned in subparagraph (ii);
- (f) one of them is —
 - (i) a trustee for the other; or
 - (ii) a trustee of a trust of which the other is a discretionary or other beneficiary.
- (5) For the purposes of this section, where the head lessor or the head lessee, or each of those parties, comprises more than one person, a relationship of a kind mentioned in subsection (4) shall be taken to be established with a party if such a relationship is established with any of the persons of whom or of which that party is comprised.

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

13B. Notices as to renewal of leases

- (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

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further renewal of the lease, the landlord shall within 30 days after receiving the request —

- (a) give a statement in writing of his intentions to the tenant; and
 - (b) subject to subsection (2), where he intends to offer a renewal or further renewal of the lease, specify in that statement the terms and conditions proposed.
- (2) A landlord who gives a statement under subsection (1) is not required to specify the rent proposed to be charged until 3 months before the expiry of the lease.
- (3) Where there is a period after the expiry of the 30 days referred to in subsection (1) during which the landlord fails to comply with subsection (1)(a) and (b) or (2), the expiry of the term of the lease is deemed to be extended by a period equal to that period of noncompliance.
- (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.]

14. Compensation by landlord

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.

15. Act prevails

- (1) Any provision of a retail shop lease that purports to —
 - (a) exclude the application of any provision of this Act; or
 - (b) limit the right of a party to the lease to refer any question arising under the lease to the Tribunal,

is void.

- (2) A provision of a retail shop lease, to the extent that it is contrary to or inconsistent with anything in this Act or with anything that by this Act the lease is taken to provide, is void.

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

Part III — Determination of questions

16. Reference of questions to State Administrative Tribunal

- (1) Subject to section 11(5), a party to a retail shop lease may refer to the Tribunal any question between the parties which he believes to be a question arising under the lease and the Tribunal shall —
 - (a) determine whether or not the question referred to 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 Tribunal in such manner as it thinks fit, subject to each party being given an opportunity to make a written submission; and
 - (b) for the purposes of section 27, is deemed to be a question referred to the Tribunal.
- (3) Nothing in this section prevents a matter or question from being dealt with through a compulsory conference or mediation process under the *State Administrative Tribunal Act 2004*.

[Section 16 inserted by No. 48 of 1990 s.14; amended by No. 55 of 2004 s. 127.]

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

[18-25. Repealed by No. 55 of 2004 s. 128.]

26. Orders of Tribunal

- (1) Without limiting any power to make an order that is conferred by the *State Administrative Tribunal Act 2004* but subject to this Act the Tribunal may make —
 - (a) an order that requires a party to 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.
- (1aa) The Tribunal may, where it considers it appropriate to do so, make an order terminating a retail shop lease under section 6A.
- [(2) repealed]*
- (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) repealed]

[Section 26 amended by No. 48 of 1990 s.20; No. 66 of 1998 s.11; No. 55 of 2004 s. 129.]

27. Other jurisdictions

- (1) Where this Act provides for the reference of a question to the Tribunal 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 Tribunal,
- 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 Tribunal the question shall —
- (a) if all parties to the proceedings so agree; or

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- (b) if the court of its own motion or on the application of a party so directs,

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

- (3) Where a question has been referred to the Tribunal 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 its own motion, the Tribunal so directs,

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

[Section 27 amended by No. 55 of 2004 s. 130.]

Part IV — Miscellaneous

28. Protection

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

[29. Repealed by No. 55 of 2004 s. 131.]

30. Regulations

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

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

31. Review of Act

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

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House of Parliament within 12 months after the commencement of that review.

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

Notes

¹ This is a compilation of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* and includes the amendments made by the other written laws referred to in the following table ^{1a}.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	43 of 1985	13 May 1985	Proclaimed 1 Sep 1985 (see section 2 and <i>Gazette</i> 30 Aug 1985 p.3065)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act (No. 2) 1985</i>	49 of 1985	28 Oct 1985	1 Sep 1985 (see section 2)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990</i> ³	48 of 1990	30 Nov 1990	30 Nov 1990 (see section 2)
<i>Acts Amendment (Franchise Fees) Act 1997, Part 3</i>	56 of 1997	12 Dec 1997	Proclaimed 31 Jan 1998 (see section 2 and <i>Gazette</i> 30 Jan 1998 p.577)
<i>Lotteries Commission Amendment Act 1998, section 23</i>	26 of 1998	30 Jun 1998	Proclaimed 22 Jul 1998 (see section 2 and <i>Gazette</i> 21 Jul 1998 p.3825)
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998</i> ⁴	66 of 1998	15 Jan 1999	Proclaimed 1 Jul 1999 (see section 2 and <i>Gazette</i> 18 Jun 1999 p.2629)
<i>Acts Amendment and Repeal (Financial Sector Reform) Act 1999, section 65</i>	26 of 1999	29 Jun 1999	Proclaimed 1 Jul 1999 (see section 2(1) and <i>Gazette</i> 30 Jun 1999 p.2905)
<i>Corporations (Consequential Amendments) Act 2001 Pt. 12 and s. 220</i>	10 of 2001	28 Jun 2001	15 Jul 2001 (see s. 2 and <i>Gazette</i> 29 Jun 2001 p. 3257 and <i>Cwlth Gazette</i> 13 Jul 2001 No. S285)
<i>Taxation Administration (Consequential Provisions) Act 2002 s. 10</i> ⁵	45 of 2002	20 Mar 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 27 Jun 2003 p. 2383)

Short title	Number and year	Assent	Commencement
<i>Acts Amendment (Equality of Status) Act 2003 Pt. 5</i>	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
<i>State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 Pt. 2 Div. 21</i> ^{6,7}	55 of 2004	24 Nov 2004	1 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7130)
<i>Planning and Development (Consequential and Transitional Provisions) Act 2005 s. 15</i>	38 of 2005	12 Dec 2005	9 Apr 2006 (see s. 2 and <i>Gazette</i> 21 Mar 2006 p. 1078)

^{1a} On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

Provisions that have not come into operation

Short title	Number and year	Assent	Commencement
<i>Retail Shops and Fair Trading Legislation Amendment Act 2006 Pt. 3</i> ⁸	47 of 2006	4 Oct 2006	To be proclaimed (see s. 2)

² Footnote no longer applicable.

³ The *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990 s. 22* reads as follows —

“

22. Saving and transitional

- (1) Subject to subsection (2), an amendment made to the principal Act by a provision of this Act does not apply to or in relation to a retail shop lease entered into before the day on which that provision comes into operation and the provisions of the principal Act as in force prior to the coming into operation of that provision shall continue to apply to and in relation to any such lease as if this Act had not been passed.

- (2) The amendments made to the principal Act by the provisions of sections 4(a)(i), (b) and (c), 5(c), 6(a), (c) and (d)(ii), 8(b), 10(a), (b), (d), (e), (g) and (i), 11, 14, 15, 18(a), 19 and 21 of this Act apply to and in relation to a retail shop lease to which the principal Act applies entered into before or after the coming into operation of those provisions.
- (3) Subsections (1) and (2) apply notwithstanding an agreement to the contrary between parties to a retail shop lease to which the principal Act applies, whether or not such agreement is contained in the retail shop lease.
- (4) In this section “**retail shop lease**” has the same meaning as it has in the principal Act.

⁴ The *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998* s. 14 reads as follows —

“

14. Saving and transitional

- (1) In this section —

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

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

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

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

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

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

- (2) Subject to subsection (3), the principal Act as amended by a provision of this Act applies only to and in relation to a new lease and the principal Act applies to and in relation to an existing lease as if that provision had not been enacted.
- (3) Each of —
- (a) section 3(1) of the principal Act as amended by section 4(1)(a) of this Act, only in relation to the insertion of the definition of “accountant”;
 - (b) section 3(3) of the principal Act as inserted by section 4(2) of this Act;
 - (c) section 11(3a) of the principal Act as inserted by section 7(3) of this Act;
 - (d) section 11(5) of the principal Act as amended by section 7(4) of this Act; and
 - (e) section 11(6) and (7) of the principal Act as inserted by section 7(5) of this Act,
- applies to and in relation to an existing lease and a new lease.
- (4) This section applies despite an agreement to the contrary between the parties to a retail shop lease whether or not the agreement is contained in the retail shop lease.
- (5) This section does not affect the operation of section 22(1) of the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990*.

”.

⁵ The *Taxation Administration (Consequential Provisions) Act 2002* s. 3 and 4 and Pt. 4 read as follows:

“

3. Relationship with other Acts

The *Taxation Administration Act 2003* is to be read with this Act as if they formed a single Act.

4. Meaning of terms used in this Act

The Glossary at the end of the *Taxation Administration Act 2003* defines or affects the meaning of some of the words and expressions used in this Act and also affects the operation of other provisions.

Part 4 — Transitional provisions

Division 1 — Interpretation

33. Definitions

In this Part —

“**commencement day**” means the day on which the *Taxation Administration Act 2003* comes into operation;

“**old Act**” means —

- (a) an Act repealed by section 5;
- (b) the old Stamp Act; or
- (c) section 41 of the *Metropolitan Region Town Planning Scheme Act 1959* as in force immediately before the commencement day;

“**old Stamp Act**” means the *Stamp Act 1921* as in force immediately before the commencement day;

“**substantive provisions**”, in relation to an old Act, means the provisions of the old Act other than those dealing with matters dealt with in the *Taxation Administration Act 2003*.

Division 2 — General transitional provisions

34. General transitional arrangements

- (1) Section 37(1) of the *Interpretation Act 1984*, except paragraphs (a) and (b), does not apply in relation to the repeal of an old Act.
- (2) The repeal of an old Act does not, unless the contrary intention appears —
 - (a) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
 - (b) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;
 - (c) subject to section 11 of *The Criminal Code* and section 10 of the *Sentencing Act 1995*, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against the old Act; or
 - (d) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture.
- (3) Subject to subsections (4) and (5) —

- (a) a right, interest, title, power, privilege, duty, obligation, liability or burden of proof referred to in subsection (2)(a) or (b) may be exercised or enforced;
- (b) a penalty or forfeiture referred to in subsection (2)(c) may be imposed and enforced; and
- (c) an investigation, legal proceeding or remedy referred to in subsection (2)(d) may be instituted, continued, or enforced,

as if the substantive provisions of the relevant old Act —

- (d) had not been repealed;
 - (e) were a taxation Act for the purposes of the *Taxation Administration Act 2003*; and
 - (f) had been amended to make any modifications necessary for this section to have effect.
- (4) If an objection, appeal or other legal proceeding (the “**action**”) was instituted under an old Act and was not finally determined before the commencement day —
- (a) the action may be continued;
 - (b) any requirement to pay interest on an amount of tax determined in the action to have been overpaid applies and may be enforced;
 - (c) any penalty may be imposed and enforced; and
 - (d) any decision, order or determination made in the action has effect, and may be enforced,

as if this Act and the taxation Acts had not commenced.

- (5) If the time limited by an old Act for doing anything is longer than the time limited by a taxation Act for doing the equivalent thing under that Act, then in relation to a matter to which subsection (3) applies, the time limited under the old Act applies in relation to the doing of the thing under the taxation Act.
- (6) If the time limited by an old Act for commencing proceedings in relation to an offence under that Act is shorter than the 5 year period limited by section 111 of the *Taxation Administration Act 2003*, then despite section 111, proceedings in relation to an offence under the old Act (including an offence under a provision of the old Act that is continued in force under this Part) cannot be commenced after the expiry of the shorter period provided for by the old Act.
- (7) In this section a reference, in relation to the *Stamp Act 1921*, to the repeal of the old Act is a reference to the amendment of the Act by the *Stamp Amendment Act 2003*.

35. Commissioner not to increase tax liability

Despite Part 3 Division 1 of the *Taxation Administration Act 2003*, the Commissioner must not make a reassessment that increases the amount of tax a person is liable to pay in relation to anything that happened before the commencement day if the reassessment could not have been made under the relevant old Act.

36. Delegations

A delegation made under an old Act and in force immediately before the commencement day continues in force on and after that day as a delegation made under section 10 of the *Taxation Administration Act 2003*.

Division 3 — Debits tax

37. Certificates of exemption from tax (*Debits Tax Assessment Act 1990*, s. 11)

- (1) A certificate issued under section 11 of the *Debits Tax Assessment Act 1990* and in force immediately before the commencement day continues in force on and after that day as a certificate issued under section 10 of the *Debits Tax Assessment Act 2002*.
- (2) Where section 13(1) of the *Debits Tax Assessment Act 2002* applies in relation to a certificate issued under section 11 of the *Debits Tax Assessment Act 1990* the Commissioner cannot make a reassessment of the amount of debits tax payable on a debit for the purpose of giving effect to that section more than 3 years after —
 - (a) if the financial institution has recovered the amount of the debits tax paid on the debit from the customer — the date on which that amount was recovered; or
 - (b) otherwise — the date on which the debits tax on the debits was paid.

Division 4 — Land tax

38. Exemptions for certain home unit owners (*Land Tax Assessment Act 1976*, s. 19)

If the amount of land tax payable on land for the financial year commencing on 1 July 2001 was assessed under section 19 of the *Land Tax Assessment Act 1976*, then on and after the commencement day section 16 of the *Land Tax Assessment Act 2002* applies in relation to that land as if that assessment had been made under section 16.

39. Inner city residential property rebate (*Land Tax Assessment Act 1976, s. 23AB*)

A notice given by the Commissioner under section 23AB(7) of the *Land Tax Assessment Act 1976* and in force immediately before the commencement day continues in force on and after that day as a notice under section 28(4) of the *Land Tax Assessment Act 2002*.

40. Land tax relief Acts

Despite —

- (a) the repeal of the *Land Tax Assessment Act 1976* and *Land Tax Act 1976*; and
- (b) the amendment of section 41 of the *Metropolitan Region Town Planning Scheme Act 1959*,

on and after the commencement day the *Land Tax Relief Act 1991* and *Land Tax Relief Act 1992* apply as if the substantive provisions of the Acts mentioned in paragraphs (a) and (b) —

- (c) had not been repealed;
- (d) were a taxation Act for the purposes of the *Taxation Administration Act 2003*; and
- (e) had been amended to make any modifications necessary for this section to have effect.

Division 5 — Pay-roll tax

41. Treatment of certain contributions (*Pay-roll Tax Assessment Act 1971, Sch. 2 cl. 5*)

Despite the repeal of the *Pay-roll Tax Assessment Act 1971*, Schedule 2 clause 5 of that Act continues to apply on and after the commencement day in relation to contributions wholly or partly in respect of services performed or rendered before 1 July 1997 as if that Act had not been repealed.

42. Reassessments and refunds (*Pay-roll Tax Assessment Act 1971, s. 19*)

Despite sections 16(3), 20(3) and 22(4) of the *Pay-roll Tax Assessment Act 2002* and section 16(1)(a) of the *Taxation Administration Act 2003*, the Commissioner is not required to make a reassessment of the amount of pay-roll tax payable by an employer in respect of wages paid or payable before the commencement day unless an application for a reassessment is made within 2 years after the tax was paid.

Division 6 — Stamp duty

- 43. Adhesive stamps (*Stamp Act 1921*, s. 15, 21 and 23)**
- (1) Despite its repeal by the *Stamp Amendment Act 2003*, section 15 of the old Stamp Act continues in force for 12 months after the commencement day in relation to adhesive stamps that were affixed on instruments before that day.
 - (2) Despite their repeal by the *Stamp Amendment Act 2003*, sections 21 and 23 of the old Stamp Act continue in force for 3 months after the commencement day in relation to adhesive stamps that were affixed on instruments before that day.
 - (3) If adhesive stamps affixed to an instrument have been cancelled in accordance with the old Stamp Act (including the provisions of the old Stamp Act continued in force by subsections (1) and (2)) the instrument is taken to have been endorsed in accordance with section 17C of the *Stamp Act 1921*.
- 44. Printing of “Stamp Duty Paid” on cheques (*Stamp Act 1921*, s. 52)**
- (1) An authorisation of a financial institution granted under section 52 of the old Stamp Act and in force immediately before the commencement day continues in force on and after that day as a special tax arrangement made under the *Taxation Administration Act 2003*.
 - (2) Any requirement that applied, immediately before the commencement day, to a person to whom an authorisation continued by subsection (1) had been granted (whether imposed by the old Stamp Act or as a condition to which the authorisation was subject), continues as a condition to which the special tax arrangement referred to in subsection (1) is subject.
- 45. First home owners — reassessment (*Stamp Act 1921*, s. 75AG)**
- Despite section 17(1) of the *Taxation Administration Act 2003*, if property that included a dwellinghouse was conveyed or transferred before the commencement day, an application for a reassessment of the duty payable on the conveyance or transfer on the basis that a rebate under section 75AG of the old Stamp Act should have been, but was not, allowed cannot be made more than 12 months after the date of the original assessment.
- 46. Reassessment of duty on grant or transfer of vehicle licences (*Stamp Act 1921*, s. 76C(18) and (19), 76CA(3a) and 76CB(9))**
- (1) This section applies in relation to a grant or transfer of a licence that occurred before the commencement day.

- (2) Despite section 17(1) of the *Taxation Administration Act 2003*, an application for a reassessment of the duty payable on the grant or transfer of a licence on the basis that the duty should not have been paid because —
- (a) in the case of a grant — no vehicle licence fee was payable under the *Road Traffic Act 1974* in respect of the licence; or
 - (b) in the case of a transfer — had the transferee applied for the licence on the date of the transfer no vehicle licence fee would have been payable under the *Road Traffic Act 1974*,
- cannot be made more than 15 months after the licence was granted or transferred.
- (3) Despite section 17(1) of the *Taxation Administration Act 2003*, an application for a reassessment of the duty paid on the transfer of a licence on the basis that the duty should have been, but was not, charged in accordance with item 6 of the Second Schedule to the old Stamp Act because the transfer did not pass a beneficial interest, cannot be made more than 12 months after the licence was transferred.
- (4) Despite section 17(1) of the *Taxation Administration Act 2003*, an application for a reassessment of the duty payable on the grant or transfer of a licence on the basis that the duty should have been, but was not, assessed on the net market value of the vehicle (as defined in section 76CB of the old Stamp Act), cannot be made more than 12 months after the licence was granted or transferred.

**47. Alternative to stamping individual insurance policies
(Stamp Act 1921, s. 95A)**

- (1) A permission granted under section 95A of the old Stamp Act and in force immediately before the commencement day continues in force on and after that day as a special tax arrangement made under the *Taxation Administration Act 2003*.
- (2) Any requirement that applied, immediately before the commencement day, to a person to whom a permission continued by subsection (1) had been granted (whether imposed by the old Stamp Act or as a condition to which the permission was subject), continues as a condition to which the special tax arrangement referred to in subsection (1) is subject.

- 48. Workers' compensation insurance (*Stamp Act 1921*, s. 97 and item 16 of the Second Schedule)**
- (1) Despite section 17(1) of the *Taxation Administration Act 2003*, an application for a reassessment of the duty payable on the issue or renewal of a policy of insurance that occurred before the commencement day on the basis that the duty was assessed under item 16(1)(a)(i) of the Second Schedule to the old Stamp Act but should have been assessed under item 16(1)(a)(ii), cannot be made more than 2 years after the beginning of the insurance policy's cover period.
 - (2) Despite the amendment of Schedule 2 item 16(1)(a) of the *Stamp Act 1921*, on and for 12 months after the commencement day —
 - (a) the reference in Schedule 2 item 16(1)(a)(i)(A) to the *Pay-roll Tax Assessment Act 2002* includes a reference to the *Pay-roll Tax Assessment Act 1971*; and
 - (b) the reference in Schedule 2 item 16(1)(a)(i)(B) to section 39 or 40 of the *Pay-roll Tax Assessment Act 2002* includes a reference to section 10 of the *Pay-roll Tax Assessment Act 1971*.
- 49. Payment of duty by returns (*Stamp Act 1921*, s. 112V)**
- (1) A permission granted under section 112V of the old Stamp Act and in force immediately before the commencement day continues in force on and after that day as a special tax arrangement under the *Taxation Administration Act 2003*.
 - (2) Any requirement that applied, immediately before the commencement day, to a person to whom a permission continued by subsection (1) had been granted (whether imposed by the old Stamp Act or as a condition to which the permission was subject), continues as a condition to which the special tax arrangement referred to in subsection (1) is subject.

”.

⁶ The *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* Pt. 5, the *State Administration Tribunal Act 2004* s. 167 and 169, and the *State Administrative Tribunal Regulations 2004* r. 28 and 42 deal with certain transitional issues some of which may be relevant for this Act.

⁷ The *State Administrative Tribunal Regulations 2004* r. 29 reads as follows:

“

29. Commercial Tenancy (Retail Shops) Agreements Act 1985

- (1) In this regulation —

“**commencement day**” means the day on which the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* Part 2 Division 21 comes into operation;

“**the CTRS Act**” means the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

- (2) If before the commencement day a matter was being dealt with by the Commercial Registrar under the CTRS Act section 11(5), 12(1)(b), 12A(4), 12B(4), 13(3)(a), 13(7), 13(7b), 13A(3) or 27(3) of that Act and that matter is transferred to the Tribunal under the Act section 167(4)(a) or (b) —
- (a) the practice and procedure, and any hearing or other fees, applicable to the matter when it was being dealt with by the Commercial Registrar continue to apply to the matter when it is being dealt with by the Tribunal; and
 - (b) the Tribunal has the powers that the Commercial Registrar had in dealing with the matter.
- (3) If —
- (a) before the commencement day a question arising under a retail shop lease is or is to be subject to mediation under the CTRS Act; and
 - (b) the question is transferred to the Tribunal under the Act section 167,

on or after the commencement day the question is to be dealt with as if it had been referred for mediation under the Act section 54(1) and the Tribunal is to specify a person to be the mediator.

”.

⁸ On the date as at which this compilation was prepared, the *Retail Shops and Fair Trading Legislation Amendment Act 2006* Pt. 3 had not come into operation. It reads as follows:

“

Part 3 — Commercial Tenancy (Retail Shops) Agreements Act 1985

19. The Act amended

The amendments in this Part are to the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

20. Long title amended

The long title is amended after “shops,” by inserting —

“

to prohibit unconscionable conduct by landlords or tenants in relation to such agreements,

”.

21. Section 3 amended

Section 3(1) is amended after the definition of “Tribunal” by deleting the full stop and inserting —

“

;

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

”.

22. Section 12D inserted

After section 12C the following section is inserted —

“

12D. Tenants’ associations etc.

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

”.

23. Part IIA inserted

After section 15 the following Part is inserted —

“

Part IIA — Unconscionable conduct

15A. Terms used in this Part

In this Part —

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

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

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

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

15B. Application of Part

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

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

- (2) This Part does not apply to conduct that occurred before the commencement.
- (3) In subsection (1) —

“**relevant day**” has the meaning given to that term by section 4(3).

15C. Unconscionable conduct of landlords

- (1) A landlord under a retail shop lease shall not, in connection with the lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a

landlord has contravened subsection (1), the Tribunal may have regard to —

- (a) the relative strengths of the bargaining positions of the landlord and tenant;
- (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord;
- (c) whether the tenant was able to understand any documents relating to the lease;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant (or a person acting on behalf of the tenant) by the landlord or a person acting on behalf of the landlord in relation to the lease;
- (e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord;
- (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants;
- (g) the requirements of any applicable industry code;
- (h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code;
- (i) the extent to which the landlord unreasonably failed to disclose to the tenant —
 - (i) any intended conduct of the landlord that might affect the interests of the tenant; and
 - (ii) any risks to the tenant arising from the landlord's intended conduct that are risks that the landlord should have foreseen would not be apparent to the tenant;
- (j) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant;
- (k) the extent to which the landlord acted in good faith;
- (l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease;
- (m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and

- (n) the extent to which the landlord required the tenant to incur unreasonable refurbishment or fit out costs.
- (3) In considering whether a landlord has contravened subsection (1), the Tribunal —
 - (a) is not to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) may have regard to circumstances existing before the commencement but not to conduct engaged in before the commencement.

15D. Unconscionable conduct of tenants

- (1) A tenant under a retail shop lease shall not, in connection with the lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a tenant has contravened subsection (1), the Tribunal may have regard to —
 - (a) the relative strengths of the bargaining positions of the landlord and tenant;
 - (b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the tenant;
 - (c) whether the landlord was able to understand any documents relating to the lease;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the landlord (or a person acting on behalf of the landlord) by the tenant or a person acting on behalf of the tenant in relation to the lease;
 - (e) the amount for which, and the circumstances under which, the landlord could have granted an identical or equivalent lease to a person other than the tenant;
 - (f) the extent to which the tenant's conduct towards the landlord was consistent with the tenant's conduct in similar transactions between the tenant and other similar landlords;
 - (g) the requirements of any applicable industry code;

- (h) the requirements of any other industry code, if the landlord acted on the reasonable belief that the tenant would comply with that code;
 - (i) the extent to which the tenant unreasonably failed to disclose to the landlord —
 - (i) any intended conduct of the tenant that might affect the interests of the landlord; and
 - (ii) any risks to the landlord arising from the tenant's intended conduct that are risks that the tenant should have foreseen would not be apparent to the landlord;
 - (j) the extent to which the tenant was willing to negotiate the terms and conditions of any lease with the landlord;
 - (k) the extent to which the tenant acted in good faith;
 - (l) the extent to which the tenant was not reasonably willing to negotiate the rent under the lease;
 - (m) the extent to which the tenant unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
 - (n) the extent to which the tenant was willing to incur reasonable refurbishment or fit out costs.
- (3) In considering whether a tenant has contravened subsection (1), the Tribunal —
- (a) is not to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) may have regard to circumstances existing before the commencement but not to conduct engaged in before the commencement.

15E. Certain conduct not unconscionable

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

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

15F. Powers of Tribunal relating to unconscionable conduct

- (1) A landlord or tenant, or former landlord or tenant, under a retail shop lease or former retail shop lease who suffers loss or damage because of unconscionable conduct of another person that contravenes section 15C or 15D may recover that loss or damage by applying in writing to the Tribunal.
- (2) An unconscionable conduct application is required to be lodged within 6 years after the alleged unconscionable conduct occurred.
- (3) Without limiting section 26, in proceedings in relation to an unconscionable conduct application, the Tribunal may make any one or more of the following orders that it considers appropriate —
 - (a) an order that a party to the proceedings pay money to a specified person, whether by way of debt, damages or restitution, or refund any money paid by a specified person;
 - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings.
- (4) The Tribunal may make any ancillary orders that it considers necessary for the purpose of enabling an order under this section to have full effect.
- (5) The Tribunal may impose any conditions that it considers appropriate when making an order under this section.
- (6) The Tribunal may make an interim order under this section pending final determination of an unconscionable conduct application, if the Tribunal considers it appropriate to do so.
- (7) In this section —
“**specified**”, in relation to an order, means specified in the order.

”.

24. Section 27 amended

After section 27(3) the following subsections are inserted —

“

- (4) Where —
 - (a) an unconscionable conduct application has been made;and

- (b) at the time it was made no issue arising under the application was the subject of civil proceedings before a court,

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

- (5) This subsection applies if —
 - (a) the unconscionable conduct application, or the part of that application to which the issue referred to in subsection (4) relates, is withdrawn or is dismissed for want of jurisdiction; or
 - (b) as a result of judicial review, a court quashes or declares invalid an order, direction or determination of the Tribunal made in respect of the application on the ground that the Tribunal had no jurisdiction to hear and determine that issue.
- (6) Where —
 - (a) an unconscionable conduct application has been made; and
 - (b) at the time it was made an issue arising under the application was the subject of civil proceedings before a court,

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

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

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25. Minor amendment

Section 16(1)(a) is amended by deleting “him” and inserting instead —

“ the Tribunal ”.

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