

**COMMERCIAL TENANCY
(RETAIL SHOPS) AGREEMENTS
AMENDMENT ACT**

No. 48 of 1990

AN ACT to amend the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

[Assented to 30 November 1990.]

The Parliament of Western Australia enacts as follows:

Short title

1. This Act may be cited as the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990*.

Commencement

2. The provisions of this Act shall come into operation on the day on which it receives the Royal Assent.

Principal Act

3. In this Act the *Commercial Tenancy (Retail Shops) Agreements Act 1985** is referred to as the principal Act.

[*Act No. 43 of 1985 as amended by Act No. 49 of 1985.]

Section 3 amended

4. Section 3 of the principal Act is amended—

(a) in subsection (1)—

(i) by deleting the definition of “landlord” and substituting the following definition—

“ “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; ”; and

(ii) in the definition of “retail shop” by inserting after “so defined” the following—

“ , 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 ”;

(b) in subsection (2) by deleting “or have entered into, an agreement or arrangement, whether in writing or not, containing a provision that, if made in the retail shop lease,” and substituting the following—

“ 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 ”; and

- (c) by repealing subsection (3) and substituting the following subsection—

“ (3) A reference in this Act to a question arising under a retail shop lease includes a reference to a question arising—

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

Section 6 amended

5. Section 6 of the principal Act is amended—

- (a) in subsection (1) by deleting “, the tenant may, subject to subsection (3), give to the landlord a written notice of termination.” and substituting the following—

“ 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. ”;

- (b) by repealing subsection (3); and

(c) by inserting after subsection (5) the following subsection—

“ (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 9 amended

6. Section 9 of the principal Act is amended—

(a) in subsection (1) by deleting paragraph (a) and substituting the following paragraph—

“ (a) key money; or ”;

(b) by inserting after subsection (1) the following subsection—

“ (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. ”;

(c) by repealing subsection (2) and substituting the following subsection—

“ (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. ”;
- and
- (d) in subsection (3)—
- (i) by inserting after “(1)” the following—

“ or (1a) ”; and
 - (ii) by inserting after “in” the following—

“ the Tribunal or ”.

Section 10 repealed and a section substituted

7. Section 10 of the principal Act is repealed and the following section is substituted—

Assignment and sub-leasing

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

(2) Where a tenant under a retail shop lease has in writing requested the landlord to consent to—

- (a) an assignment of the lease; or
- (b) where the lease provides for a sub-lease of the premises by consent, a sub-lease of the premises,

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

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

Section 11 amended

8. Section 11 of the principal Act is amended—

(a) by repealing subsection (2) and substituting the following subsection—

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

(b) by repealing subsection (3) and substituting the following subsections—

“ (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) two persons licensed under that Act, one of whom is appointed by the landlord and one of whom is appointed by the tenant.

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

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

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

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

Section 12 amended

9. Section 12 of the principal Act is amended—

- (a) by inserting after the section designation “12.” the subsection designation “(1)”; and
- (b) by inserting after subsection (1) as so designated the following subsection—

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

- (a) the construction of the retail shopping centre;
- (b) any extension of the centre or structural improvement to the centre, or
- (c) any plant or equipment that is or becomes the property of the owner of the retail shopping centre,

is void. ”.

Section 13 amended

10. Section 13 of the principal Act is amended—

- (a) by repealing subsections (1) and (2) and substituting the following subsections—

“ (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. ”;

(b) in subsection (3) (a)—

(i) by inserting after “exercisable” the following—

“ , by notice in writing in the prescribed form given to the landlord, ”; and

(ii) by inserting after “current term” in both places where it appears the following—

“ , or the option term, as the case may require ”;

(c) by inserting after subsection (3) the following subsections—

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

(a) if the question is decided in favour of the landlord, to the time when the question is decided; or

(b) if the question is decided in favour of the tenant, to a period ending 7 days after the tenant receives notification of the decision,

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

(3b) Where the current term or the option term of a lease has been extended under subsection (3a) (b) and the tenant exercises the option referred to in subsection (3) during the 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. ”;

(d) in subsection (4)—

(i) in paragraph (b) by deleting “day mentioned in subsection (1) (a) or (b), as the case may be” and substituting the following—

“ day provided for by subsection (1) ”; and

(ii) by deleting “in a notice”;

(e) in subsection (5)—

(i) by deleting “under subsection (1)” and substituting the following—

“ of the exercise of that option, ”;

and

(ii) in paragraph (a) by deleting “thereunder” and substituting the following—

“ under subsection (1) ”;

(f) in subsection (6)—

(i) by deleting “, whether or not the lease is for a certain term, is not entitled to determine the lease at a time that is before the day mentioned in subsection (1) (a) or (b), as the case may be” and substituting the following—

“ 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 ”;

- (ii) in paragraph (c) by deleting the full stop and substituting the following—

“ or (7a); or ”; and

- (iii) by inserting after paragraph (c) the following paragraph—

“ (d) where the Registrar has granted an application by the tenant under subsection (7b). ”;

- (g) in subsection (7) by deleting “day mentioned in subsection (1) (a) or (b), as the case may be,” and substituting the following—

“ expiry of the term that may be obtained by the tenant under subsection (1) ”;

- (h) by inserting after subsection (7) the following subsections—

“ (7a) A landlord in relation to a retail shopping centre may make an application under subsection (7) as to any number of retail shop leases in respect of that centre where he is of the opinion that the same special circumstances exist in relation to each lease the subject of his application, and the Registrar may exercise his powers under that subsection accordingly.

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

(a) the application was made by the tenant or prospective tenant of his own free will; and

(b) the circumstances of the case warrant the granting of the application. ”;

- (i) by repealing subsection (8) and substituting the following subsection—

“ (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. ”; and

- (j) by inserting after subsection (8) the following subsections—

“ (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 13A amended

11. Section 13A of the principal Act is amended in subsection (1) (a) by deleting “day mentioned in section 13 (1) (a) or (b), as the case may be” and substituting the following—

“ day provided for by section 13 (1) ”.

Section 13B inserted

12. After section 13A of the principal Act the following section is inserted—

Notices as to renewal of leases

“ 13B. (1) Where a retail shop lease does not provide, whether directly or by operation of section 13, an option or a further option of renewal of the lease and the tenant, within

12 months before the expiry of the lease, in writing requests from the landlord a statement of the intentions of the landlord as to renewal or further renewal of the lease, the landlord shall within 30 days after receiving the request—

- (a) give a statement in writing of his intentions to the tenant; and
- (b) subject to subsection (2), where he intends to offer a renewal or further renewal of the lease, specify in that statement the terms and conditions proposed.

(2) A landlord who gives a statement under subsection (1) is not required to specify the rent proposed to be charged until 3 months before the expiry of the lease.

(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 15 amended

13. Section 15 of the principal Act is amended—

(a) in subsection (2)—

- (i) by deleting “Subject to subsection (3), a provision of a retail shop lease is” and substituting the following—

“ A provision of a retail shop lease ”; and

- (ii) by inserting after “provide,” the following—

“ is ”; and

(b) by repealing subsection (3).

Sections 16 and 17 repealed and a section substituted

14. Sections 16 and 17 of the principal Act are repealed and the following section is substituted—

Reference of questions to Registrar

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

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

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

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

Section 18 amended

15. Section 18 of the principal Act is amended by deleting “17” wherever it occurs and substituting the following—

“ 16 (1) (b) ”.

Section 19 amended

16. Section 19 of the principal Act is amended by repealing subsection (6).

Section 20 amended

17. Section 20 of the principal Act is amended by inserting after subsection (2) the following subsections—

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

“ (4) A person who has been served with a summons under subsection (3) and fails without reasonable excuse, proof of which lies on him, to comply with the summons commits an offence and is liable to a fine not exceeding \$1 000. ”.

Section 22 amended

18. Section 22 of the principal Act is amended—

(a) in paragraph (b) by deleting “17” and substituting the following—

“ 16 (1) (b) ”;

(b) in paragraph (c) by inserting after “of the reference,” the following—

“ whether or not he has been served with a summons under section 20 (3), ”;

(c) by deleting “or” after paragraph (d);

(d) in paragraph (e) by deleting the comma and substituting the following—

“ ; or ”; and

(e) by inserting after paragraph (e) the following paragraph—

“ (f) the Registrar is of the opinion that because of the importance or complexity of the question, or for any other reason, the question ought to be determined by the Tribunal. ”.

Section 24 repealed and a section substituted

19. Section 24 of the principal Act is repealed and the following section is substituted—

Jurisdiction of Tribunal

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

- (a) an application by a tenant for an order under section 6 (1) (b) or 14;
- (b) a debt action by a tenant under section 9 (3); and
- (c) a matter referred to it by the Registrar under section 22. ”.

Section 26 amended

20. Section 26 of the principal Act is amended by inserting after subsection (1) the following subsection—

“ (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. ”.

Section 29 amended

21. Section 29 of the principal Act is amended in subsection (1) (a) by deleting “17” and substituting the following—

“ 16 ”.

Saving and transitional

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

(2) The amendments made to the principal Act by the provisions of sections 4 (a) (i), (b) and (c), 5 (c), 6 (a), (c) and (d) (ii), 8 (b), 10 (a), (b), (d), (e), (g) and (i), 11, 14, 15, 18 (a), 19 and 21 of this Act apply to and in relation to a retail shop lease to which the principal Act applies entered into before or after the coming into operation of those provisions.

(3) Subsections (1) and (2) apply notwithstanding an agreement to the contrary between parties to a retail shop lease to which the principal Act applies, whether or not such agreement is contained in the retail shop lease.

(4) In this section "retail shop lease" has the same meaning as it has in the principal Act.
