

Queensland



# RETAIL SHOP LEASES ACT 1994

**Reprinted as in force on 1 March 2002  
(includes amendments up to Act No. 71 of 2001)**

**Reprint No. 3A**

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This Act is reprinted as at 1 March 2002. The reprint—

- shows the law as amended by all amendments that commenced on or before that day (Reprints Act 1992 s 5(c))
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The reprint includes a reference to the law by which each amendment was made—see list of legislation and list of annotations in endnotes.

Minor editorial changes allowed under the provisions of the Reprints Act 1992 have been made to use aspects of format and printing style consistent with current drafting practice (s 35).

This page is specific to this reprint. See previous reprints for information about earlier changes made under the Reprints Act 1992. A table of earlier reprints is included in the endnotes.

**Also see endnotes for information about—**

- **when provisions commenced**
- **editorial changes made in earlier reprints.**

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# **RETAIL SHOP LEASES ACT 1994**

[as amended by all amendments that commenced on or before 1 March 2002]

## **An Act about retail shop leases**

### **PART 1—PRELIMINARY**

#### **1 Short title**

This Act may be cited as the *Retail Shop Leases Act 1994*.

### **PART 2—OBJECT OF ACT AND ITS ACHIEVEMENT**

#### **3 Object of Act**

The object of this Act is to promote efficiency and equity in the conduct of certain retail businesses in Queensland.

#### **4 How object of Act to be achieved**

The object of this Act is to be achieved through—

- (a) mandatory minimum standards for retail shop leases; and
- (b) a low cost dispute resolution process for retail tenancy disputes.

## PART 3—INTERPRETATION

### *Division 1—Standard definitions*

#### 5 Definitions

In this Act—

“**agreement**” includes an oral agreement.

“**2000 amendment Act**” means the *Retail Shop Leases Amendment Act 2000*.

“**apportionable outgoings**” of a lessor means the lessor’s outgoings other than specific outgoings.

“**approved accounting standards**” means the standards set out in the statements of accounting and auditing standards issued by CPA Australia ACN 008 392 452 and the Institute of Chartered Accountants in Australia.

“**approved agent**” means—

- (a) for the mediation of a retail tenancy dispute—an agent approved by the mediator; or
- (b) for the hearing of a retail tenancy dispute by a tribunal—an agent approved by the tribunal.

“**approved auditor**” means—

- (a) a person registered, or taken to be registered, as an auditor under the Corporations Law; or
- (b) a person who is a member of, and holds a practising certificate issued by, CPA Australia ACN 008 392 452 and the Institute of Chartered Accountants in Australia.

“**approved form**” means a form approved by the chief executive.

“**arbitration**” means arbitration conducted—

- (a) under the *Commercial Arbitration Act 1990*; or
- (b) if a retail shop lease provides for the manner of arbitration—
  - (i) under the lease; and

(ii) to the extent that the lease is inadequate—under the *Commercial Arbitration Act 1990*.

**“attendance notice”** see section 76(1)(c).

**“base rent”** means rent, or the part of rent, that is a specified amount of money (whether or not the amount is subject to change).

**“building”** includes any structure.

**“chairperson”** means the chairperson of a tribunal.

**“common areas”** see section 6.

**“conviction”** includes a plea of guilty or a finding of guilt by a court even though a conviction is not recorded.

**“disclosure statement”**, for part 5, means a statement in the approved form containing the particulars prescribed under a regulation.

**“dispute notice”** see section 55.

**“dispute resolution process”** means the process of mediation and hearing of a retail tenancy dispute under part 8, and includes all steps taken in making arrangements for a mediation conference or tribunal hearing or in the follow-up of a mediation conference or tribunal hearing.

**“effective rent basis”**, for the determination of rent under a retail shop lease, means the determination of the rent taking into account all associated advantages and disadvantages under arrangements made between the lessor and lessee that reflect the net consideration passing to the lessor from the lessee under the lease and associated arrangements.

**“enforcement order”** see section 83(2)(a).

**“entered into”**, for an assignment of a lease, means the lessor has consented to the assignment.

**“existing retail shop lease”** means—

- (a) a retail shop lease entered into or renewed before the commencement of this section; or
- (b) a retail shop lease entered into, or renewed, under an option under an agreement that was entered into before the commencement of this section; or
- (c) a retail shop lease entered into under an agreement for lease that was entered into before the commencement of this section; or

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- (d) an assignment of a retail shop lease mentioned in paragraph (a), (b) or (c).

**“former Act”** means the *Retail Shop Leases Act 1984*.

**“GST”** has the meaning given under the GST Act.<sup>1</sup>

**“GST Act”** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth).

**“key money”** means—

- (a) an amount to be paid to, or at the direction of, a lessor by way of a premium, non-repayable bond or otherwise, for the granting, renewing or assigning of a lease; or
- (b) any benefit to be conferred on, or at the direction of a lessor for the granting, renewing or assigning of a lease.

**“lease”** means an agreement under which a person gives or agrees to give to someone else for valuable consideration a right to occupy premises whether or not the right is—

- (a) an exclusive right to occupy the premises; or
- (b) for a term or by way of a periodic tenancy or tenancy at will.

**“leased building”** means the building (other than a building in a retail shopping centre) in which a leased shop is situated.

**“leased shop”** means the retail shop leased, or to be leased, under a retail shop lease.

**“lessee”** in relation to a retail tenancy dispute includes the former lessee.

**“lessor”** means the person who, under a lease, is or would be entitled to the rent payable for the leased premises regardless of the person’s interest in the premises, and includes—

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1 *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth), section 195—

**“GST”** means tax that is payable under the GST law and imposed as goods and services tax by any of these—

- (a) the *A New Tax System (Goods and Services Tax Imposition—General) Act 1999*; or
- (b) the *A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999*; or
- (c) *A New Tax System (Goods and Services Tax Imposition-Excise) Act 1999*.

- (a) the lessor's agent; and
- (b) in relation to a retail tenancy dispute—the former lessor.

**“maintenance amounts”** see section 40(1).

**“mediation”** means the process under part 8, division 2 under which the parties to a retail tenancy dispute use a mediator to help them resolve the dispute by negotiated agreement without adjudication.

**“mediation agreement”** see section 61.

**“mediation conference”** means a conference conducted by a mediator under part 8, division 2 between the parties to a retail tenancy dispute.

**“mediator”** means a mediator appointed under this Act.

**“original order”** see section 89(1).

**“outgoings”**, of a lessor, see section 7.

**“payment order”** see section 83(2)(b).

**“promotion amounts”** see section 41(1)(a).

**“public corporation”** means a public corporation within the meaning of paragraph (a) of the definition “public corporation” under the Corporations Law.

**“renewed retail tenancy dispute”** means a retail tenancy dispute that is renewed under section 90.

**“retail business”** means a business prescribed by regulation as a retail business.

**“retail shop”** means premises that are—

- (a) situated in a retail shopping centre; or
- (b) used wholly or predominantly for the carrying on of 1 or more retail businesses.

**“retail shop lease”** means a lease of a retail shop, other than a lease of—

- (a) a retail shop with a floor area of more than 1 000 m<sup>2</sup> by a public corporation or a public corporation's subsidiary; or
- (b) premises in a theme or amusement park; or
- (c) premises at a flea market, including an arts and crafts market; or
- (d) a temporary retail stall at—

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- (i) an agricultural or trade show; or
- (ii) a carnival, festival or cultural event; or
- (e) another type of premises prescribed by regulation.

**“retail shopping centre”** see section 8.

**“retail tenancy dispute”** means any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into.

**“specialist retail valuer”** means a person whose name is recorded on the list of specialist retail valuers kept under the *Valuers Registration Act 1992*.

**“specific outgoings”**, of a lessor, means the following—

- (a) the lessor’s outgoings that are attributable to a lessee because of the lessee’s direct use of the services or facilities incurring the outgoings;
- (b) an amount mentioned in section 24A(2).<sup>2</sup>

**“subsidiary”** of a public corporation means a subsidiary of the corporation under the Corporations Law.

**“tribunal”** means a retail shop lease tribunal established under this Act.

**“tribunal legal member”** means a person appointed as a tribunal panel member under section 102(a).

**“tribunal member”** means a member of a tribunal.

**“tribunal panel”** means the panel of retail shop lease tribunal members mentioned in section 102.

**“tribunal panel member”** means a member of the tribunal panel.

**“turnover”** see section 9.

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<sup>2</sup> Section 24A (GST payments)



*Division 2—Extended definitions***6 Meaning of “common areas”**

(1) “**Common areas**” of a retail shopping centre are areas in or adjacent to the centre that are used, or intended for use—

- (a) by the public; or
- (b) in common by the lessees of premises in the centre in relation to the conduct of businesses in premises in the centre.

(2) “**Common areas**” include—

- (a) stairways, escalators and elevators; and
- (b) malls and walkways; and
- (c) parking areas; and
- (d) toilets and rest rooms; and
- (e) gardens and fountains; and
- (f) information, entertainment, community and leisure facilities.

(3) However, “**common areas**” do not include leased areas.

**7 Meaning of “outgoings”**

(1) A lessor’s “**outgoings**” for a retail shopping centre or leased building are—

- (a) the lessor’s reasonable expenses directly attributable to the operation, maintenance or repair of—
  - (i) the centre or building; and
  - (ii) areas used in association with the centre or building; and
- (b) charges, levies, premiums, rates or taxes payable by the lessor because the lessor is the owner or occupier of—
  - (i) the centre or building; or
  - (ii) the land on which the centre or building is situated; and
- (c) an amount mentioned in section 24A(2).

(2) An outgoing mentioned in subsection (1) may be either an apportionable outgoing or a specific outgoing and the sum of the apportionable outgoings and specific outgoings is the lessor's outgoings.

(3) However, lessor's "**outgoings**" do not include—

- (a) land tax payable on the land on which the centre or building is situated; and
- (b) expenditure of a capital nature, including the amortisation of capital costs; and
- (c) contributions to a depreciation or sinking fund; and
- (d) insurance premiums for loss of profits; and
- (e) lessor's contributions to merchants' associations and centre promotion funds; and
- (f) payment of interest and charges on amounts borrowed by the lessor; and
- (g) another item prescribed by regulation.

*Examples for subsection (3)(b)—*

1. Costs and expenses of or incidental to the building or extension of, or major improvement of a structural nature to, the centre or building or area used in association with the centre or building, are expenditure of a capital nature.
2. Replacement costs of major items of plant and equipment in the centre or building are expenditures of a capital nature.

## **8 Meaning of "retail shopping centre"**

(1) A "**retail shopping centre**" is a cluster of premises—

- (a) 5 or more of which are used wholly or predominantly for carrying on retail businesses; and
- (b) for which 1 person is, or would be if the premises were leased, the head lessor.

(2) However, a building with more than 1 storey is not a "**retail shopping centre**" except to the extent that a storey of the building contains, or adjoining storeys of the building each contain, a group of premises complying with subsection (1)(a) and (b).

*Examples of subsection (2)—*

1. In a multistorey building owned by 1 person, the ground floor contains 5 retail businesses. All other floors of the building are used solely for commercial

purposes, eg. premises used by legal or accounting firms or financial advisory services. Only the ground floor of the building is a retail shopping centre.

2. In a multistorey building owned by 1 person, the ground and first floors each contain 5 retail businesses. All other floors of the building are used solely for commercial purposes. The ground and first floors of the building collectively are a retail shopping centre.
3. Each floor of a 5 storey building owned by 1 person contains 5 or more retail businesses. The building is a retail shopping centre.

(3) To remove any doubt, if a retail business is conducted in premises situated in a building separated from a retail shopping centre only by the centre's common areas, the **“retail shopping centre”** includes the premises.

*Example of subsection (3)—*

A fast food shop is conducted from a building in a retail shopping centre's car park. The shop is part of the retail shopping centre.

## **9 Meaning of “turnover”**

(1) **“Turnover”** of a business carried on in a leased shop is the gross sales of the business for any particular period.

(2) However, **“turnover”** of a business does not include the following amounts—

- (a) the net amount of discounts reasonably and properly allowed to customers in the usual course of business;
- (b) 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) amounts of uncollected credit accounts written off by the lessee;
- (d) cash or credit refunds allowed on sales that have previously been included as gross receipts if the goods sold are returned and the sales cancelled;
- (e) fees for services refunded in whole or part if the fees have previously been included as gross receipts;
- (f) amounts of instalments refunded to customers for cancelled lay-by transactions;
- (g) taxes, including GST, imposed on the purchase price or cost of hire of goods or services at the point of sale or hire;

- (h) delivery charges;
- (i) the value of goods exchanged between 2 or more of the lessee's shops if the exchange is made solely for the convenient conduct of the lessee's business and not for concluding a sale made at or from the leased shop;
- (j) the value of goods returned to shippers, wholesalers or manufacturers;
- (k) amounts received from the sale of the lessee's fixtures and fittings from the leased shop;
- (l) amounts received from lottery sales made on a commission basis (other than commission on the sales).

## **PART 4—OPERATION OF ACT AND FORMER ACT**

### **10 Act binds all persons**

This Act binds all persons, including the State and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.

### **11 Application of Act—when lease entered into**

A retail shop lease is entered into on whichever is the earlier of the following dates—

- (a) the date the lease becomes binding on the lessor and lessee;
- (b) the date the lessee enters into possession of the leased shop.

### **12 Application of Act—where lease entered into**

This Act applies to all retail shop leases of premises in Queensland—

- (a) regardless of where the lease is entered into; and
- (b) even though the lease purports to be governed by a law other than Queensland law.

### **13 Application of Act to leases—general**

(1) Subject to subsections (2) to (7), this Act<sup>3</sup> applies to all retail shop leases whether entered into or renewed before or after 28 October 1994.

(2) This part (other than section 14), part 5 and part 6 do not apply to existing retail shop leases.

(3) Section 27,<sup>4</sup> as in force immediately before the commencement of the *Retail Shop Leases Amendment Act 1999*, continues to apply to a retail shop lease entered into before the commencement, and any extension or renewal of the lease, as if that Act had not commenced.

(4) Subject to subsection (5), section 27, as amended by the 2000 amendment Act, applies only to a retail shop lease entered into after the commencement of this subsection.

(5) Section 27(8) applies only to a retail shop lease entered into after 28 October 1994.

(6) Part 6, division 8A,<sup>5</sup> applies only to a retail shop lease entered into after the commencement of the division.

(7) Subsection (1) has effect subject to the following provisions—

- section 15
- section 16
- section 17
- section 21
- section 42
- section 45(3)
- section 46(9)
- part 7.

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3 See the *Acts Interpretation Act 1954*, section 14H (References taken to be included in citation of law).

4 Section 27 (Timing and bases of rent reviews)

5 Part 6, division 8A (Provisions about unconscionable conduct)

#### **14 Continued application of certain provisions of former Act to existing retail shop leases**

(1) The following provisions of the former Act continue to apply (to the extent that they applied immediately before the commencement of this section) to an existing retail shop lease as if this Act had not been enacted—

- part 1, other than section 5A
- part 2
- part 3, other than the following sections—
  - section 10B
  - section 10C
  - section 15A
- section 56
- section 57
- section 58
- schedules 1 and 2.

(2) For the purposes of applying a provision of the former Act to an existing retail shop lease, a reference in the provision to—

- (a) a specialist retail valuer is a reference to a specialist retail valuer under the *Valuers Registration Act 1992*; and
- (b) the registrar is a reference to the chief executive; and
- (c) a mediator is a reference to a mediator under this Act; and
- (d) a retail shop leases tribunal or tribunal is a reference to a tribunal under this Act.

#### **15 Application of Act—if premises become or cease to be retail shop after commencement of lease**

(1) This Act does not apply to—

- (a) a lease of premises that become a retail shop after the commencement of the lease; or
- (b) an assignment of the lease; or
- (c) a renewal of the lease under an option under the lease.

*Example of subsection (1)(a)—*

On 1 April 1995 a person enters into a 3 year lease for the conduct of a business from premises that are not in a retail shopping centre. On 1 September 1995, the business is prescribed by regulation as a retail business. Under the subsection, this Act does not apply to the lease even though the premises have become a retail shop.

**(2)** This Act continues to apply to—

- (a) a lease of premises that cease to be a retail shop after the commencement of the lease; or
- (b) an assignment of the lease; or
- (c) a renewal of the lease under an option under the lease.

*Example of subsection (2)(a)—*

On 1 April 1995 a person enters into a 3 year lease for the conduct of a business from premises in a retail shopping centre. On 1 September 1995, the business ceases to be a retail shop because the cluster of premises in which the leased premises are situated cease to be a retail shopping centre. Under the subsection, this Act continues to apply to the lease even though the premises are no longer a retail shop.

## **16 Application of Act to existing leases in exempt enterprises**

**(1)** This Act does not apply to leases—

- (a) entered into before the commencement of this section between the owner of an exempt enterprise under the former Act and a tenant of premises in the enterprise; and
- (b) to which the former Act did not apply because of the exemption of the enterprise from the provisions of the former Act.

**(2)** However, part 8, division 2 applies to a lease mentioned in subsection (1) if the lease would be a retail shop lease if entered into after the commencement of this section.

## **17 Application of Act to leases of service stations**

**(1)** This Act does not apply to a retail shop lease for the carrying on of the business of a service station if the *Petroleum Retail Marketing Franchise Act 1980* (Cwlth) applies to the carrying on of the business under a franchise agreement within the meaning of that Act.

**(2)** This Act (other than part 6) applies to a retail shop lease (whether entered into or renewed before or after the commencement of this section) for the carrying on of the business of a service station if the

*Petroleum Retail Marketing Franchise Act 1980* (Cwlth) does not apply to the carrying on of the business under a franchise agreement within the meaning of that Act.

### **18 Act's provisions implied in leases**

If, under this Act, a duty is imposed or an entitlement is conferred on a lessor or lessee under a retail shop lease, the duty or entitlement is taken to be included in the lease.

### **19 Contracting out of Act prohibited**

A provision of a retail shop lease is void if it purports to exclude the application of a provision of this Act that applies to the lease.

### **20 Act prevails over inconsistent leases**

If a provision of this Act is inconsistent with a provision of a retail shop lease, the provision of this Act prevails and the provision of the lease is void to the extent of the inconsistency.

## **PART 5—PRELIMINARY DISCLOSURES ABOUT LEASES**

### **21 Application of part**

(1) This part does not apply to—

- (a) a retail shop lease for a periodic tenancy or tenancy at will; or
- (b) a retail shop lease entered into or renewed under an option under a retail shop lease.

(2) Sections 22, 22A and 23 do not apply to an assignment of a retail shop lease.



**22 Lessor's disclosure obligation to prospective lessee**

(1) At least 7 days before a prospective lessee of a retail shop enters into a retail shop lease, the lessor must give to the person a draft of the lease and a disclosure statement.

(2) If a lessor does not comply with subsection (1)—

- (a) the lessee may terminate the lease by giving written notice to the lessor within 2 months after the lessee enters into the lease; and
- (b) the lessor is liable to pay to the lessee the reasonable compensation decided by way of the dispute resolution process for loss or damage suffered by the lessee because of the failure.

(3) The termination of a lease under subsection (2)(a) does not affect any right, privilege or liability acquired, accrued or incurred under the lease for any period before the termination.

**22A Prospective lessee's disclosure obligation to lessor**

Before entering into a retail shop lease, the prospective lessee must give the lessor a disclosure statement if the lessor—

- (a) asks the prospective lessee for the disclosure statement; and
- (b) complies with section 22(1).

**22B Assignor's and prospective assignee's disclosure obligations to each other**

(1) An assignor of a retail shop lease must give a prospective assignee a disclosure statement at least 7 days before asking the lessor to consent to the assignment.

(2) If asked by the assignor, the prospective assignee must give a disclosure statement to the assignor before the lessor is asked to consent to the assignment.

**22C Lessor's and prospective assignee's disclosure obligations to each other**

(1) At least 7 days before an assignment of a retail shop lease is entered into, the lessor must give the prospective assignee a disclosure statement and a copy of the lease.

(2) If asked by the lessor, the prospective assignee must give a disclosure statement to the lessor before the assignment is entered into.

## **22D Financial, and legal advice certificates**

(1) If a prospective lessee of a retail shop is the lessee of less than 5 retail shops in Australia, and uses each shop wholly or predominantly for carrying on 1 or more retail businesses, the prospective lessee, before entering into the lease, must give the lessor—

- (a) a financial advice certificate; and
- (b) a legal advice certificate.

(2) If a prospective assignee of a retail shop lease is the lessee of less than 5 retail shops in Australia, and uses each shop wholly or predominantly for carrying on 1 or more retail businesses, the prospective assignee, before entering into the assignment of the lease, must give the lessor—

- (a) a financial advice certificate; and
- (b) a legal advice certificate.

(3) For subsections (1)(a) and (2)(a), a ‘financial advice certificate’ is a certificate—

- (a) in the approved form; and
- (b) containing the particulars prescribed under a regulation; and
- (c) signed by a person who—
  - (i) is a member of 1 of the following entities—
    - (A) CPA Australia ACN 008 392 452;
    - (B) Institute of Chartered Accountants;
    - (C) National Institute of Accountants; and
  - (ii) holds a current practising certificate issued by the entity.

(4) For subsections (1)(b) and (2)(b), a ‘legal advice certificate’ is a certificate—

- (a) in the approved form; and
- (b) signed by a barrister or solicitor who is admitted to practise in Queensland; and

- (c) stating that the barrister or solicitor has given the person seeking the certificate advice about the legal meaning and effect of—
  - (i) the terms and conditions of the proposed lease, or the lease the subject of the proposed assignment; and
  - (ii) the disclosure statement given to the person under this part; and
- (d) containing the other particulars prescribed under a regulation.

### **22E Effect of failure to comply with sections 22A–22D**

(1) This section applies if a person (the “**disclosing person**”) fails to give another person (the “**receiving person**”) a document under sections 22A to 22D and the relevant lease or assignment is entered into.

(2) A retail tenancy dispute exists between the persons, and the receiving person, within the relevant period, may ask the tribunal for an order that the disclosing person give the document to the receiving person.<sup>6</sup>

(3) In this section—

“**relevant period**” means—

- (a) for section 22A or 22D(1)—within 2 months after the lease is entered into; or
- (b) for section 22B, 22C or 22D(2)—within 2 months after the assignment is entered into.

### **23 Lessor to give lessee certified copy of lease**

Within 30 days after a retail shop lease is signed by the parties, the lessor must give the lessee a certified copy of the signed lease.

Maximum penalty—40 penalty units.

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<sup>6</sup> See also section 50 (Retail tenancy disputes between lessors and lessees about assignments of leases)

## **PART 6—MINIMUM LEASE STANDARDS**

### *Division 1—Preliminary*

#### **24 Lessee's obligations to make particular payments**

(1) A retail shop lease must not contain a provision requiring the lessee to make any payment other than for the following—

- (a) rent;
- (b) if specified in the lease, the following—
  - (i) the lessor's outgoings, or the specified part of the lessor's outgoings, for the retail shopping centre or leased building in which the leased shop is situated;
  - (ii) damages for breach of a term of the lease;
  - (iii) an indemnity given by the lessee to the lessor for loss or damage suffered by the lessor as a result of the actions or omissions of the lessee or a person acting for the lessee;
  - (iv) subject to subsection (3), interest on arrears of rent or outgoings.

(2) Subsection (1) applies whether the provision requires payment to be made—

- (a) to the lessor or someone else; or
- (b) by the lessee or someone else.

*Example of subsections (1) and (2)—*

A provision of a retail shop lease requiring a lessee to pay the lessor's land tax or to reimburse the lessor for land tax (regardless of by whom, or to whom, the payment is to be made) is void under section 20.

(3) A retail shop lease may contain a provision requiring the lessee to make a payment for interest on arrears of rent or outgoings only if the interest rate, or the way in which the interest rate is to be calculated, is stated in the lease.

(4) Subsection (1) has effect subject to the following sections—

- section 24A
- section 34

- section 39(2)
- section 40
- section 41
- section 48(2).

## **24A GST payments**

(1) Nothing in this Act prevents a lessor from requiring a lessee to pay an amount (the “**GST amount**”) that is directly or indirectly attributable to GST payable for a supply made by the lessor to the lessee under the lease.

(2) If a lease provides that the GST amount is to be paid by the lessee to the lessor as an outgoings item, the GST amount is a specific outgoing.

### *Division 2—Turnover rent*

## **25 Requirements if rent a percentage of turnover**

(1) This section applies if, under a retail shop lease, the rent is or may be calculated either in whole or part as a percentage of the turnover of the lessee’s business carried on, or to be carried on, in or from the leased shop.

(2) The lease must specify the formula to be used to calculate the rent.

(3) During the term of the lease, the lessee must give to the lessor—

- (a) at the end of each month or at the other times agreed between the parties, a certificate specifying with reasonable accuracy the turnover of the business; and
- (b) at the end of each year or at the other times agreed between the parties, and at the termination of the lease, a statement of the turnover of the business prepared by an approved auditor.

(4) If the lessee complies with subsection (3), the lessee is taken to have fully complied with any obligation under the lease to give the lessor the turnover of the lessee’s business.

***Division 3—Confidentiality of turnover information*****26 Lessor not to disclose turnover information**

(1) A lessor must not, whether directly or indirectly, disclose to anyone else information obtained by the lessor about the turnover of the lessee's business (whether under the lease or under section 25) without the lessee's agreement.

Maximum penalty—60 penalty units.

(2) However, the lessor may disclose information—

- (a) in a document giving the aggregate turnover of businesses, or a class of business, in the retail shopping centre in which the leased shop is situated if the disclosure is made in a way that does not disclose information about the turnover of an individual lessee's business; or
- (b) specifying the turnover of the lessee's business to—
  - (i) a prospective purchaser or mortgagee of the retail shopping centre in which the leased shop is situated; or
  - (ii) a professional adviser to, or properly appointed agent of, a prospective purchaser or mortgagee mentioned in subparagraph (i); or
  - (iii) the lessor's professional advisers; or
  - (iv) a court under a court order; or
  - (v) a mediator or tribunal under this Act; or
  - (vi) a specialist retail valuer under section 30.

(3) A person who is given information under subsection (2)(b)(i) or (ii)—

- (a) may use the information only to enable the prospective purchaser or mortgagee to make a decision whether to purchase the lessor's interest in, or to obtain financial accommodation on the security of, the retail shopping centre; and
- (b) must not, whether directly or indirectly, disclose the information to anyone else without the lessee's agreement.

Maximum penalty—60 penalty units.

(4) A person who is given information under subsection (2)(b)(iii)—

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- (a) may use the information only to determine the lessee's rent on the basis of the turnover of the lessee's business carried on in the leased shop or to advise the lessor on the centre's trading performance; and
- (b) must not, whether directly or indirectly, disclose the information to anyone else without the lessee's agreement.

Maximum penalty—60 penalty units.

(5) If a person discloses information in contravention of subsection (1), (3) or (4) and the lessee suffers loss or damage because of the disclosure, the lessee is entitled to the reasonable compensation for the loss or damage agreed between the lessor and lessee or, failing agreement, decided by way of the dispute resolution process.

(6) An agreement under the lease about the disclosure of turnover information or the amount of compensation is not an agreement for the purposes of subsection (1), (3)(b), (4)(b) or (5).

*Division 4—Rent review***27 Timing and bases of rent reviews**

(1) If, under a retail shop lease, the rent payable under the lease or any renewal or extension of the lease is to be reviewed during the term of the lease or under an option to renew or extend the lease, the lease must state the timing of the reviews and the basis on which each review is to be made.

(2) The rent may not be reviewed more than once in each year of the lease.

(3) Subsection (2) does not apply to the first year of the lease.

(4) The rent may be reviewed using different bases during the term of the lease, but each review must be made using only 1 basis.

(5) The basis for a rent review must be a single basis consisting of 1 of the following—

- (a) the current market rent of the leased shop;
- (b) an independently published index of prices, costs or wages;
- (c) a fixed percentage of the base rent;
- (d) a fixed actual amount;

- (e) another basis prescribed by regulation;
- (f) a single basis formed by a combination of 2 or more bases mentioned in paragraphs (b) to (e).

(6) If the rent is determined as a base rent plus an amount equal to a percentage of the turnover of the lessee's business above a stated amount, the review of the base rent must be made in accordance with subsections (4) and (5).

(7) If, under a retail shop lease, the rent is to be reviewed during the term of the lease or any renewal or extension of the lease, the rent payable for the rental period after the timing of an invalid review is—

- (a) for an invalid review mentioned in subsection (9), definition "invalid review", paragraph (a)—the same as the rent payable before the timing of the review; or
- (b) for an invalid review mentioned in subsection (9), definition "invalid review", paragraph (b)—the rent worked out on 1 of the bases, chosen by the lessee, on which the review was made; or
- (c) for an invalid review mentioned in subsection (9), definition "invalid review", paragraph (c)—the rent worked out on 1 of the bases, chosen by the lessee, on which the review was to be made under the void provision.

(8) It is declared that an adjustment of the rent merely to enable the lessor to recover GST from the lessee is not a rent review.

(9) In this section—

**"invalid review"**, of rent under the lease, means—

- (a) a review in a year of the lease, other than the first year, in which the rent is to be reviewed under the lease more than once; or
- (b) a review made under the lease using more than 1 basis; or
- (c) a review under a provision of a lease that is void under section 36(d) or (e).<sup>7</sup>

**"year"**, of the lease, means a period of 12 months starting on—

- (a) the day the lease is entered into; or
- (b) an anniversary of the day the lease was entered into; or

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<sup>7</sup> Section 36 (Certain rent review provisions of leases void)



- (c) if, for a particular 12 month period, there is not an anniversary of the day the lease was entered into—the last day of the month corresponding to the month the lease was entered into.<sup>8</sup>

## **28 Rent review on basis of current market rent**

(1) This section applies if—

- (a) rent under a retail shop lease is to be reviewed on the basis of the current market rent of the leased shop; and
- (b) the lessor and lessee can not agree on the current market rent within 1 month after the review date.

(2) The current market rent is to be determined by a specialist retail valuer agreed by the lessor and lessee, or failing agreement, nominated by the chief executive.

(3) The valuer may carry out the determination only if the valuer is independent of the interests of the lessor and lessee.

## **29 Matters to be considered by specialist retail valuers**

In making a determination of the current market rent, the specialist retail valuer—

- (a) must determine the rent—
  - (i) on the basis of the rent that would be reasonably expected to be paid for the retail shop if it were unoccupied and offered for leasing for the use for which the shop may be used under the lease or a substantially similar use; and
  - (ii) on the basis of gross rent less lessor's outgoings payable by the lessee under the lease; and
  - (iii) on an effective rent basis; and
- (b) must not have regard to the value of the goodwill of the lessee's business or the lessee's fixtures and fittings in the retail shop; and
- (c) must have regard to—

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<sup>8</sup> Paragraph (c) deals with a lease entered into on the last day of February in a leap year.

- (i) submissions from the lessor and lessee about the market rent of the shop; and
- (ii) the other matters prescribed by regulation.

### **30 Valuer may require information from lessor**

(1) The specialist retail valuer may, by written notice, require the lessor to give the valuer any relevant information about leases in the retail shopping centre in which the shop is situated.

(2) If the lessor does not give the information to the valuer within 14 days after the notice is given to the lessor, the valuer, within 7 days after the lessor fails to give the information, must give the lessee written notice of the lessor's failure.

(3) If the lessee is given a notice under subsection (2), a retail tenancy dispute exists between the lessor and the lessee.

(4) This section has effect despite the provisions of the retail shop lease.

### **31 Requirements of determination**

(1) The specialist retail valuer's determination of the current market rent must be in writing, identify the location of the leased shop and specify the matters taken into consideration by the valuer in making it.

(2) The determination must also state—

- (a) whether the current market rent includes GST; and
- (b) if the rent includes GST, the GST amount.

### **32 Valuer to give determination to lessor and lessee**

The specialist retail valuer must give the valuer's determination to the lessor and lessee within 1 month after the latest of the following—

- (a) the valuer is asked to make the determination;
- (b) if the lessor is required to give the valuer information (“**lease information**”) under section 30—the lessor gives the lease information to the valuer;

- (c) if a retail tenancy dispute under section 30 proceeds to mediation or a tribunal hearing under part 8<sup>9</sup>—the lessor gives the lease information to the valuer as required by or under a mediation agreement made, or tribunal order given, under the part.

### **33 Effect of determination**

The current market rent of the leased shop determined by the specialist retail valuer is the current market rent of the shop and the rent payable under the lease for the rental period under the review.

### **34 Parties to share cost of determination**

The lessor and lessee must each pay one-half of the specialist retail valuer's fee for the determination to the valuer.

### **35 Confidentiality of lease information**

(1) A specialist retail valuer who obtains information under section 30 must not—

- (a) use the information for any purpose other than to determine the current market rent for the leased shop; and
- (b) whether directly or indirectly, disclose the information to anyone else without the agreement of the lessor and lessee.

Maximum penalty—60 penalty units.

(2) However, subsection (1)(b) does not prevent the valuer from disclosing information in a way that does not identify a particular lease when specifying the matters taken into consideration by the valuer in making the determination.

(3) If the valuer discloses information in contravention of subsection (1) and the lessor or lessee suffers loss or damage because of the disclosure, the lessor or lessee is entitled to be paid by the valuer the reasonable compensation for the loss or damage agreed between the lessor or lessee and the valuer or, failing agreement, decided by way of the dispute resolution process.

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9 Part 8 (Retail tenancy dispute resolution)

**36 Certain rent review provisions of leases void**

A provision of a retail shop lease is void to the extent that it—

- (a) requires the lessee to appoint someone to determine the current market rent of the leased shop other than in accordance with this Act; or
- (b) requires the lessee to pay for a determination of current market rent by a specialist retail valuer other than under section 34; or
- (c) requires the determination of the current market rent of the leased shop to be made other than in accordance with this Act; or
- (d) reserves, or has the effect of reserving, to a party a discretion to apply 1 of 2 or more methods of calculating the rent of the leased shop on a particular review of the rent; or
- (e) provides for the rent of the leased shop to change on a particular review of the rent in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent.

*Division 5—Lessor’s outgoings and other payments***37 Requirements when lessee to pay lessor’s outgoings**

(1) In this section—

“**outgoings**” include maintenance and promotion amounts.

(2) If, under a retail shop lease, the lessee is required to pay all or part of the lessor’s outgoings for the retail shopping centre or leased building in which the leased shop is situated—

- (a) the lease must specify—
  - (i) the outgoings payable by the lessee; and
  - (ii) how the outgoings will be determined and apportioned to the lessee; and
  - (iii) how the outgoings may be recovered by the lessor from the lessee; and
- (b) the lessor must give to the lessee an annual estimate in the approved form of the lessor’s outgoings, other than specific outgoings—

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- (i) at least 1 month before the start of the period to which the estimate relates; or
  - (ii) if the lessee enters into the lease during the period to which the estimate relates or within 1 month before the start of the period—when the lessee enters into the lease; and
- (c) the lessor must give the lessee an audited annual statement in the approved form of the outgoings within 3 months after the end of the period to which the outgoings relate.

Maximum penalty—60 penalty units.

**(3)** The outgoings shown in the annual estimate and statement must be itemised so that the amount shown for each item is not more than 5% of the total outgoings shown in the estimate or statement.

**(4)** However, the amount shown for an item may be more than 5% of the total outgoings if the item relates to—

- (a) a charge, levy, rate or tax payable under an Act; or
- (b) a particular outgoing that can not be broken up to comply with the subsection (3).

**(5)** The audited annual statement must—

- (a) be prepared by an approved auditor in accordance with the approved accounting standards;<sup>10</sup> and
- (b) contain the auditor's opinion on whether the statement presents fairly the lessor's outgoings for the accounting period to which it relates in accordance with the lessor's financial records and this Act; and
- (c) compare the annual estimates of the lessor's outgoings with the amount actually spent by the lessor for the outgoings during the period; and
- (d) compare the total amount actually spent by the lessor for outgoings during the period with the total amounts actually paid by lessees to the lessor during the period.

**(6)** If a person becomes the owner of a retail shopping centre or building containing 1 or more retail shops, the first estimate and statement of outgoings given by the person may be made for a period less than 1 year.

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<sup>10</sup> The standards, among other things, deal with the integrity, objectivity and independence of the auditor—see paragraph 16 of the AUS1 standards.

**37A Lessor's recovery of electricity charges**

(1) This section applies if—

(a) under a retail shop lease—

(i) the lessor's outgoings include an amount for electricity charges; and

(ii) the lessee is required to pay all or part of the amount; and

(b) the way in which the lessor may recover the amount from the lessee is stated under the *Electricity Act 1994*.

(2) The lessor may recover the amount from the lessee only under the *Electricity Act 1994*.

**38 Lessee's liability to pay proportion of lessor's apportionable outgoings**

(1) In this section—

“**apportionable outgoings**” include maintenance amounts.

(2) The proportion of a lessor's apportionable outgoings for a retail shopping centre or leased building payable by a lessee under a retail shop lease who is enjoying or sharing the benefit of the outgoing must not be more than the proportion that the area of the lessee's leased shop bears to the total area of all premises in the centre or building that are—

(a) leased to or occupied by lessees who enjoy or share the benefit resulting from the outgoing (whether or not they are lessees under retail shop leases); or

(b) available for lease to or occupation by lessees who would, if leased or occupied, enjoy or share the benefit resulting from the outgoing (whether or not they would be lessees under retail shop leases).

**39 Payment of key money and amount for goodwill prohibited**

(1) A person must not, as lessor or for the lessor, under or in relation to a retail shop lease, seek or accept the payment of key money or any amount for the goodwill of the lessee's business carried on in or from the leased shop.

Maximum penalty—100 penalty units.

(2) However, subsection (1) does not prevent a lessor from—

- (a) recovering from the lessee the lessor's costs reasonably incurred in investigating a proposed assignee of the lessee under a retail shop lease; or
- (b) recovering from the lessee the lessor's reasonable expenses of and incidental to an assignment of a retail shop lease and any necessary consents to the assignment; or
- (c) receiving payment of rent in advance if the amount paid is not more than the rent payable for 1 rental period under the lease; or
- (d) getting a repayable bond from the lessee to secure the lessee's obligations under the lease; or
- (e) receiving from the purchaser of the lessor's business conducted in a retail shop payment for the goodwill of the business or the plant, equipment, fixtures or fittings in the retail shop; or
- (f) receiving payment from the lessee for amounts spent by the lessor for fitting out the leased shop; or
- (g) seeking and accepting payment for the grant of a franchise in relation to the grant of a retail shop lease.

(3) If an amount is paid to, or a benefit accepted by, a person in contravention of subsection (1), the person who paid or conferred the benefit may recover the amount or value of the benefit as a debt.

### *Division 6—Other payments for retail shops in retail shopping centres*

#### **40 Sinking fund for major maintenance and repairs**

(1) This section applies if a lessee under a retail shop lease is required to pay amounts (“**maintenance amounts**”) into a sinking fund for major maintenance of, or repairs to, the buildings, plant and equipment of, and areas used in association with, the retail shopping centre in which the leased shop is situated.

(2) The lessor may keep only 1 sinking fund for the purposes mentioned in subsection (1) for the retail shopping centre.

(3) The lessor must pay maintenance amounts paid by the lessee for the credit of the sinking fund into an interest bearing account kept by the lessor.

Maximum penalty—100 penalty units.

(4) The lessor must only apply amounts standing to the credit of the sinking fund and interest earned on the fund for a purpose mentioned in subsection (1).

Maximum penalty—100 penalty units.

(5) The lessor is liable to pay into the sinking fund any deficiency attributable to a failure by the lessor or any predecessor in title of the lessor to comply with subsection (4).

(6) The total payments into the sinking fund of all lessees of retail shops in the retail shopping centre for any year must not be more than 5% of the total of the lessor's estimated outgoings for the centre for the year.

(7) The lessor must not seek or accept payments of maintenance amounts from lessees of retail shops in the retail shopping centre that would result in the amount standing to the credit of the sinking fund being more than \$100 000.

Maximum penalty for subsection (7)—100 penalty units.

#### **41 Promotion and advertising**

(1) This section applies if—

- (a) a lessee under a retail shop lease is required to pay amounts for promotion and advertising of the retail shopping centre (“**promotion amounts**”) in which the leased shop is situated to the lessor or an entity to which the lessee is required under the lease to be a member; and
- (b) under the lease, the promotion amounts are not treated as part of the lessor's outgoings.<sup>11</sup>

(2) The lessor must only apply promotion amounts for promotion and advertising directly attributable to the centre.

Maximum penalty—100 penalty units.

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<sup>11</sup> See also section 37 (Requirements when lessee to pay lessor's outgoings). Under the section, “outgoings” include maintenance and promotion amounts.



(3) To remove any doubt, subsection (2) does not prevent the lessor from applying promotion amounts for joint promotions and advertising with other retail shopping centres.

### *Division 7—Implied provisions for compensation*

#### **42 Compensation provisions implied in certain leases**

A retail shop lease (other than a lease for a periodic tenancy or tenancy at will) is taken to include sections 43 and 44.

#### **43 When compensation is payable**

(1) The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor's authority—

- (a) relocates the lessee's business to other premises during the term of the lease or of any renewal of it; or
- (b) substantially restricts the lessee's access to the leased shop; or
- (c) takes action (other than action under a lawful requirement) that substantially restricts, or alters—
  - (i) access by customers to the leased shop; or
  - (ii) the flow of potential customers past the shop; or
- (d) causes significant disruption to the lessee's trading in the leased shop or does not take all reasonable steps to prevent or stop significant disruption within the lessor's control; or
- (e) does not have rectified as soon as is practicable—
  - (i) any breakdown of plant or equipment under the lessor's care or maintenance; or
  - (ii) any defect in the retail shopping centre or leased building containing the leased shop, other than a defect due to a condition that would have been reasonably apparent to the lessee when the lessee entered into the lease or, for a lessee by way of assignment of the lease, when the lessee accepted the assignment; or

- (f) neglects to clean, maintain or repaint the retail shopping centre or leased building containing the leased shop or the part of the centre or building that, under the lease, is the lessor's responsibility; or
- (g) causes the lessee to vacate the leased shop before the end of the lease or renewal of it because of the extension, refurbishment or demolition of the retail shopping centre or leased building containing the shop.

(2) The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because—

- (a) the lessee entered into the lease, or a renewal of it, on the basis of a false or misleading statement or misrepresentation made by the lessor or any person acting under the lessor's authority; or
- (b) the leased shop was not available to the lessee for trading on the date specified in the disclosure statement given to the lessee under section 22 because of the default of the lessor or anyone acting under the lessor's authority.

(3) However, the lessee is not entitled to compensation under subsection (1) or (2) merely because the lessor has prevented the lessee from extending, as permitted by the *Trading (Allowable Hours) Act 1990*, the hours during which the lessee keeps the leased shop open for trading.

#### **44 Amount of compensation**

(1) If the lessor and lessee can not agree on the amount of compensation, the compensation payable to the lessee is to be decided by way of the dispute resolution process.

(1A) A tribunal, in deciding the amount of compensation payable under section 43(1)(a), may have regard to how much notice of the proposed relocation was given to the lessee.

(2) An agreement under the lease about compensation payable under section 43 is void to the extent that it limits the amount of compensation payable under the section.

***Division 8—Lease dealings*****45 Lessee’s right to deal with lease and business assets**

(1) A lessor under a retail shop lease must not obstruct or hinder the lessee in dealing with the lease or other assets of the business carried on in the leased shop by way of security.

Maximum penalty—40 penalty units.

(2) However, a lessee under a retail shop lease is not entitled to deal with the lease or other assets of the business carried on in or from the leased shop by way of security without the lessor and the prospective secured creditor entering into an agreement about—

- (a) the times when the creditor or the creditor’s agents may enter the leased shop, before or after the end of the lease; and
- (b) the times by or when, and the way in which, the creditor, must or may remove fixtures, fittings or equipment subject to the security before or after the end of the lease; and
- (c) the disposal of fixtures, fittings or equipment that are not removed under the agreement; and
- (d) the right of the creditor to enter into possession, or to place someone else in possession, of the leased shop if the lessee defaults under the security; and
- (e) making good any damage caused to the leased shop because of the creditor exercising the creditor’s rights under the security; and
- (f) matters incidental to the matters mentioned in paragraphs (a) to (e).

(3) Despite sections 19 and 20, this section does not apply to a retail shop lease if the lease declares that this section does not apply to it.

**46 Options to renew leases**

(1) This section applies if a retail shop lease (the “**existing lease**”) does not provide for an option on the lessee’s part to renew the lease.

(2) The lessee may, by written notice given to the lessor, ask the lessor to renew the existing lease for a specified period.

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(3) The notice must be given at least 2 months, but not longer than 1 year, before the end of the existing lease.

(4) On receiving the notice the lessor must, by written notice in the approved form given to the lessee, inform the lessee—

- (a) whether or not the lessor offers the lessee the option to renew the existing lease; and
- (b) if the lessor offers the lessee the option to renew the existing lease—the period of the renewal and the proposed conditions of the proposed renewed lease.

(5) The notice must be given within whichever is the later of—

- (a) 1 month after the lessor's receipt of the lessee's notice under subsection (2); or
- (b) 6 months before the end of the existing lease.

(6) If the lessor offers the lessee the option to renew the existing lease and the lessee wishes to accept the offer, the lessee must, by written notice given to the lessor, accept the offer within 1 month after the lessee's receiving the offer.

(7) On giving the acceptance of the offer, the lessee is entitled to be granted a renewal of the existing lease on the conditions stated in the lessor's offer to renew the lease if—

- (a) there exists no unremedied default on the lessee's part when the acceptance is given; and
- (b) no default happens during the balance of the lease's term, other than a default—
  - (i) that the lessor waives; or
  - (ii) for which the lessee is granted relief by the court under section 124 of the *Property Law Act 1974*.

(8) If the lessor fails to give notice under subsection (4) and there is no agreement between the lessor and lessee about the lessee's holding over, the lessee is entitled to occupy the leased shop for the term of 6 months from the end of the existing lease on the same conditions as the existing lease (other than the term of the existing lease and the lessee's entitlement under this section).

(9) An agreement under the lease about the lessee's holding over is not an agreement for the purposes of subsection (8).

(10) This section does not apply to a retail shop lease for a periodic tenancy or a tenancy at will.

***Division 8A—Provisions about unconscionable conduct<sup>12</sup>***

**46A Unconscionable conduct**

(1) A lessor must not, in connection with a retail shop lease, engage in conduct that is, in all the circumstances, unconscionable.

(2) A lessee must not, in connection with a retail shop lease, engage in conduct that is, in all the circumstances, unconscionable.

(3) For this section, a person is not to be taken to engage in unconscionable conduct in connection with a retail shop lease only because the person—

- (a) starts legal proceedings relating to the lease; or
- (b) refers to arbitration a dispute or claim relating to the lease; or
- (c) fails to issue or renew the lease.

(4) This section does not apply to conduct that occurred before the commencement of this section.

**46B Matters tribunal may consider in deciding if a party's conduct is unconscionable**

(1) In deciding whether a party to a retail tenancy dispute has engaged in unconscionable conduct in connection with the retail shop lease, the tribunal may have regard to the following matters—

- (a) the relative strengths of the bargaining positions of each of the parties;
- (b) whether, as a result of conduct engaged in by the party, the other party was required to comply with conditions that were not reasonably necessary for the protection of the other party's legitimate interests;
- (c) whether the other party was able to understand any documents relating to the lease;

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12 For corresponding provisions, see the *Trade Practices Act 1974* (Cwlth), section 51AC (Unconscionable conduct in business transactions).

- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the other party or a person acting for the other party by the party or a person acting for the party in relation to the lease;
- (e) the amount for which, and the circumstances under which, the other party could have acquired an identical or equivalent lease from a person other than the party;
- (f) the extent to which the party's conduct towards the other party was consistent with the party's conduct in similar transactions between the party and parties like the other party;
- (g) the requirements of any applicable industry code;
- (h) the requirements of any other industry code, if the other party acted on the reasonable belief that the party would comply with the code;
- (i) the extent to which the party unreasonably failed to disclose to the other party—
  - (i) any intended conduct of the party that might affect the other party's interests; and
  - (ii) any risks to the other party arising from the party's intended conduct (being risks that the party should have foreseen would not be apparent to the other party);
- (j) the extent to which the party was willing to negotiate the terms and conditions of any lease with the other party;
- (k) the extent to which the party and the other party acted in good faith.

**(2)** The tribunal may also have regard to circumstances existing before the commencement of section 46A.

**(3)** Subsections (1) and (2) do not limit the matters to which the tribunal may have regard in making its decision.

**(4)** However, the tribunal must not have regard to the following—

- (a) any circumstances that were not reasonably foreseeable at the time of the alleged contravention of section 46A(1) or (2);
- (b) conduct engaged in before the commencement of section 46A.

(5) In this section—

“**applicable industry code**” has the meaning given under the *Trade Practices Act 1974* (Cwlth), section 51ACA.

“**industry code**” has the meaning given under the *Trade Practices Act 1974* (Cwlth), section 51ACA.<sup>13</sup>

### *Division 9—General*

#### **46C Relocating lessee’s business**

(1) A lessor must not relocate the lessee’s business to other premises during the term of the lease, or any renewal of it, without giving the lessee at least 3 months written notice of the relocation.

(2) The notice must state the premises to which the lessee’s business is to be relocated.

#### **47 Lessee’s right to independent legal advice**

(1) A lessee or prospective lessee under a retail shop lease must not be compelled to use, or pay for (in whole or part), the services of a lawyer nominated by the lessor.

(2) If a person is compelled to use the services of a lawyer in contravention of subsection (1), the lessor is liable to pay to the person the amount paid by the person for the services.

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13 *Trade Practices Act 1974* (Cwlth), section 51ACA—

“**applicable industry code**”, in relation to a corporation that is a participant in an industry, means:

- (a) the prescribed provisions of any mandatory industry code relating to the industry; and
- (b) the prescribed provisions of any voluntary industry code that binds the corporation.

“**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.

**48 Lessee's liability for costs associated with preparation etc. of lease**

(1) A lessee under a retail shop lease is not liable to pay any amount for the lessor's legal or other expenses in relation to the following—

- (a) preparing, renewing or extending the lease;
- (b) submitting the lease, on its expiry, for reassessment of lease duty under the *Duties Act 2001*.

(2) However, subsection (1) does not prevent a lessee under a retail shop lease from being required to pay for 1 or more of the following—

- (a) survey fees associated with the registration of the lease;
- (b) the reasonable expenses incurred by the lessor in obtaining the consent of the lessor's mortgagee to the lease;
- (c) lease duty on the lease;
- (d) registration of the lease.

**49 Lessee's right to join or form commercial associations**

A lessor must not include in a retail shop lease a provision preventing or restricting the lessee from—

- (a) joining any chamber of commerce, retail trade association or other commercial association; or
- (b) forming or joining a lessees' association to promote a retail shopping centre or for another purpose of mutual interest to lessees.

Maximum penalty—40 penalty units.

**50 Retail tenancy disputes between lessors and lessees about assignments of leases**

(1) A retail tenancy dispute exists between a lessor and lessee under a retail shop lease if—

- (a) under the lease, the lessee may assign the lease only with the lessor's consent; and
- (b) the lessee has given the lessor full particulars of a proposed assignment of the lease and asked the lessor, in writing, to consent to it; and



- (c) the lessor has not given an answer to the lessee within 1 month after the request and the particulars are given to the lessor.

(2) A retail tenancy dispute also exists between a lessor and lessee under a retail shop lease if, in relation to consenting to an assignment of a retail shop lease, the lessor—

- (a) purports or seeks to impose on the prospective assignee as lessee, an obligation that is not the lessee's obligation under the lease; or
- (b) purports or seeks to withdraw from the prospective assignee a right conferred on the lessee under the lease; or
- (c) purports or seeks to impose, as a condition for consenting to the assignment, a condition that the lessee considers unreasonable.

(3) To remove any doubt, this section does not limit the circumstances in which a retail tenancy dispute may exist between a lessor and lessee under a retail shop lease.

## **PART 7—RETAIL SHOP LEASE TRADING HOURS**

### **51 Definitions**

In this part—

**“core trading hours”**, for a retail shopping centre, means hours not outside the allowable trading hours under the *Trading (Allowable Hours) Act 1990* that—

- (a) are stated in a resolution passed by the eligible lessees of the centre under section 52 as the hours retail shops in the centre may be required to open for trading; or
- (b) until a resolution is passed—
  - (i) for existing leases—the lessees of the centre were required, immediately before the commencement of the *Trading (Allowable Hours) Amendment Act 1994*, to keep the retail shops open for trading; or
  - (ii) for other leases—the lessees of the centre are required by the lessor to keep the retail shops open for trading.

“**eligible lessee**”, for a retail shopping centre, means a lessee of a retail shop in the centre (whether or not the lessee is a lessee under a retail shop lease).

“**eligible shop**”, for a retail shopping centre, means a retail shop in the centre (whether or not the shop is leased under a retail shop lease).

“**existing lease**” means a retail shop lease current at the commencement of the *Trading (Allowable Hours) Amendment Act 1994*.

## **52 Requirements for resolution**

A resolution is passed by the eligible lessees of a retail shopping centre if—

- (a) the resolution is put to a vote of the eligible lessees by 1 or more of the lessees or the lessor; and
- (b) at least 7 days before the vote is taken, each eligible lessee is given a written notice that includes—
  - (i) the terms of the resolution; and
  - (ii) information about how and when the vote is to be taken; and
- (c) voting is by secret ballot on the basis of 1 vote for each eligible shop in the centre; and
- (d) each eligible lessee is allowed to vote on that basis; and
- (e) votes are cast by eligible lessees representing at least 50% of the number of eligible shops; and
- (f) the resolution is supported by at least 75% of the eligible lessees who voted; and
- (g) each person who casts a vote may scrutinise the counting of votes.

## **53 Trading hours**

(1) A lessor must not require a lessee under an existing lease to extend the hours that, immediately before the commencement of the *Trading (Allowable Hours) Amendment Act 1994*, the lessee was required to keep the retail shop open for trading.

Maximum penalty—100 penalty units.

(2) However, a retail shop lease may include a condition requiring the lessee to keep the premises open for trading in the core trading hours for the retail shopping centre.

(3) A condition of a retail shop lease that purports to impose on the lessee an obligation to open the premises for trading outside the core trading hours for the retail shopping centre is void.

(4) However, if the term is in an existing lease, it is void only to the extent that it requires the lessee to open the premises for trading outside the core trading hours for the retail shopping centre.

(5) A lessee under a retail shop lease (the “**first lessee**”) is not liable under the first lessee’s lease for any additional outgoings of the lessor only because an eligible lessee’s shop is open for trading outside the core trading hours when the first lessee’s shop is not open for trading.

(6) Subsection (5) applies despite any condition in the first lessee’s lease.

## **PART 8—RETAIL TENANCY DISPUTE RESOLUTION**

### *Division 1—Preliminary*

#### **54 Parties’ rights under this part preserved**

To remove any doubt, if a provision of a retail shop lease requires or permits a dispute under or about the lease to be referred to arbitration or be heard by any court or tribunal, the provision does not limit a party’s rights under this part.

### *Division 2—Mediation of retail tenancy disputes*

#### **55 Lodgment of retail tenancy disputes**

(1) A party to a retail tenancy dispute that is within a mediator’s jurisdiction under section 97 may lodge notice of the dispute with the chief executive.

(2) The notice (“**dispute notice**”) must be in the approved form and accompanied by the fee prescribed by regulation.

### **56 Chief executive to act on dispute notice**

(1) Within 7 days after the dispute notice is lodged, the chief executive must—

- (a) nominate a mediator to mediate the retail tenancy dispute; and
- (b) give written notice to the parties to the dispute of—
  - (i) the mediator nominated to mediate the dispute; and
  - (ii) the time, date and place of the mediation conference to be conducted by the mediator.

(2) The notice under subsection (1)(b) must be given at least 7 days before the mediation conference.

### **57 Limited right of representation**

At the mediation conference, each party to the retail tenancy dispute—

- (a) must conduct the party’s own case; and
- (b) may be represented by an approved agent only if—
  - (i) the party is a corporation; or
  - (ii) the mediator is satisfied an agent should be permitted to represent the party.

### **58 Conference to be held in private**

The mediation conference is not open to the public.

### **59 Parties attendance at conference not compellable**

A party to the retail tenancy dispute can not be compelled to attend the mediation conference.

**60 Parties to mediation conference**

(1) The mediator may allow a person to take part in the mediation conference if the mediator is satisfied the person has a sufficient interest in the resolution of the retail tenancy dispute.

(2) However, the person does not become a party to the dispute.

**61 Mediation agreements**

(1) This section applies if the parties to the retail tenancy dispute reach an agreement on the solution of the dispute.

(2) The agreement (the “**mediation agreement**”) must be put into writing and signed by or for the parties.

(3) The mediator must give a copy of the signed agreement to the chief executive as soon as practicable after it is signed.

**62 No official record of mediation conference**

(1) A person must not make an official record of anything said at a mediation conference.

Maximum penalty—40 penalty units.

(2) However, the mediator may make notes of the mediation conference the mediator considers appropriate.

*Division 3—Reference of retail tenancy disputes to tribunal***63 Reference of dispute—by mediator**

(1) This section applies if—

(a) a retail tenancy dispute is within a tribunal’s jurisdiction<sup>14</sup> and—

(i) the parties can not reach a mediated solution to the dispute; or

(ii) a party to the dispute does not attend the mediation conference for the dispute; or

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14 Section 109 (Tribunals’ jurisdiction)

- (iii) the dispute is not settled within 4 months after the dispute notice is lodged; and
  - (b) the retail shop lease has not ended (whether by expiry, surrender or termination) more than 4 months before the dispute notice was lodged.
- (2) The mediator must, by written notice given to the chief executive, promptly refer the dispute to the chief executive.

#### **64 Reference of dispute—by party**

(1) In this section—

**“mediation agreement”** includes a mediation agreement under section 26 of the former Act.

(2) A party to a retail tenancy dispute may, by notice given to the chief executive in the approved form, refer the dispute to the chief executive if—

- (a) any of the following provisions apply—
  - (i) the party claims that another party to a mediation agreement has not complied with the agreement within the time specified in it or, if no time is specified, within 2 months after the agreement is signed;
  - (ii) a mediator refuses to refer the dispute to the chief executive because the mediator is of the opinion that the dispute is not within a tribunal’s jurisdiction;
  - (iii) a court has ordered that a proceeding started in the court for the dispute be removed to a tribunal;<sup>15</sup> and
- (b) the retail shop lease has not ended (whether by expiry, surrender or termination) more than 4 months before the dispute notice was lodged.

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15 Section 111(1) (Transfer of hearings between tribunals and courts)

***Division 4—Retail tenancy disputes hearings******Subdivision 1—Directions hearings*****65 Chief executive must refer dispute for directions hearing**

(1) Within 14 days after a retail tenancy dispute is referred to the chief executive, the chief executive, by written notice, must refer the dispute to a tribunal legal member to hold a directions hearing.

(2) As soon as practicable after receiving the notice, the tribunal legal member must advise the chief executive of the time and date on which the directions hearing is to be held.

(3) Subject to subsection (5), the chief executive must give the parties to the dispute reasonable written notice of the time, date and place of the directions hearing.

(4) If requested by the tribunal legal member, the notice must include a requirement that each party (the “**first party**”), before the directions hearing, disclose to the tribunal legal member and each other party each document that is—

- (a) in the possession or under the control of the first party; and
- (b) directly relevant to an allegation in issue in the dispute; and
- (c) stated in the notice.

(5) If the tribunal legal member decides that a directions hearing should not be held because of exceptional circumstances, the tribunal legal member must give the chief executive notice of the decision.

**66 Holding directions hearing**

(1) The provisions of subdivision 2 (other than sections 71(2) and (3) and 74<sup>16</sup>) about the conduct of, and procedure at, a tribunal’s hearing of a retail tenancy dispute and the tribunal’s powers at the hearing apply, with the necessary changes, to a directions hearing.

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16 Sections 71 (Limited right of representation) and 74 (Questions to be decided by majority of tribunal)

*Examples for subsection (1)—*

1. A reference to a tribunal hearing is a reference to a directions hearing.
2. A reference to the tribunal or chairperson is a reference to the tribunal legal member.

(2) At the directions hearing, the tribunal legal member may make the decisions and give the directions the tribunal legal member considers appropriate, including directions about the following—

- (a) questions of law;
- (b) the tribunal's jurisdiction;
- (c) discovery and inspection of documents;
- (d) the parties' representation at the tribunal's hearing of the retail tenancy dispute.

(3) If the dispute is to proceed to a tribunal hearing after the directions hearing, the tribunal legal member, as soon as practicable after the directions hearing, must give the chief executive written notice that a tribunal hearing is required.

### *Subdivision 2—Tribunal's hearing*

#### **66A Appointment of tribunal**

Within 14 days after receiving a notice under section 65(5) or 66(3), the chief executive must—

- (a) appoint a tribunal to hear the dispute; and
- (b) give written notice to the tribunal members of their appointment to hear the dispute; and
- (c) give written notice to the parties to the dispute of the appointment and composition of the tribunal to hear the dispute.

#### **67 Presiding member**

The chairperson is to preside at the tribunal's hearing of the retail tenancy dispute.



**68 Venues**

The tribunal may sit at the times and places the chairperson decides.

**69 Hearing to be held in private**

(1) The tribunal's hearing of the retail tenancy dispute is not open to the public.

(2) However, a person may attend the tribunal's hearing with the agreement of the tribunal and the parties to the dispute.

**70 Appearances before tribunal**

The following persons are entitled to appear at the tribunal's hearing of the retail tenancy dispute—

- (a) the parties to the dispute;
- (b) a person granted leave to appear by the tribunal.

**70A Necessary parties**

The tribunal may order that a person be included as a party to the dispute if—

- (a) asked by a party to the retail tenancy dispute; and
- (b) the person's presence is necessary to allow the tribunal to adjudicate effectually and completely on the dispute.

**71 Limited right of representation**

(1) At the tribunal's hearing of the retail tenancy dispute, a party to the dispute may be represented by an approved agent.

(2) However, a party to the dispute may not be represented at the tribunal's hearing by a lawyer or professional advocate without the other party's agreement if the dispute—

- (a) does not involve the payment of an amount; or
- (b) involves the payment of an amount less than the prescribed amount within the meaning of the *Small Claims Tribunals Act 1973*.

(3) In addition, if, at a directions hearing for the dispute, the tribunal made a decision about a party's representation at the tribunal's hearing, the party may not be represented at the hearing by anyone else without the other party's agreement.

## **72 Procedure**

(1) When conducting the hearing, the tribunal must—

- (a) observe natural justice; and
- (b) act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it.

(2) In conducting the hearing, the tribunal—

- (a) is not bound by the rules of evidence; and
- (b) may inform itself of any matter in the way it considers appropriate; and
- (c) may decide the procedures to be followed for the hearing.

(3) However, the tribunal must comply with this subdivision and any procedural rules prescribed by regulation.

## **73 Amendment of dispute**

(1) The tribunal may at any stage of the hearing of the retail tenancy dispute amend the particulars of the dispute in the way it considers appropriate—

- (a) if asked by the party who lodged the dispute notice; or
- (b) on its own initiative if the parties to the dispute agree.

(2) For this Act, the amended dispute is taken to be the dispute.

## **74 Questions to be decided by majority of tribunal**

(1) A question before the tribunal must be decided by a majority of the tribunal members.

(2) However, a question of law must be decided by the chairperson.

**75 Tribunals to keep records of proceedings**

- (1) The tribunal must keep a record of its proceedings.
- (2) The record may be kept in the way the tribunal considers appropriate.

**76 Powers of tribunal**

- (1) At the hearing, the tribunal may—
  - (a) require a person to give evidence on oath and, for that purpose, the chairperson may administer an oath; and
  - (b) proceed in the absence of a party to the retail tenancy dispute; and
  - (c) by written notice (“**attendance notice**”), require a person to attend the hearing at a specified time, date and place—
    - (i) to give evidence; or
    - (ii) to produce a specified document or thing.
- (2) The tribunal may adjourn the hearing from time to time.

**77 Inspection of documents**

- (1) If a document or thing is produced to the tribunal at the hearing, the tribunal may—
  - (a) inspect the document or thing; and
  - (b) make copies of, photograph, or take extracts from, the document or thing if it is relevant to the hearing.
- (2) The tribunal may also take possession of the document or thing, and keep it while it is necessary for the hearing.
- (3) While it keeps a document or thing, the tribunal must permit a person otherwise entitled to possession of the document or thing to inspect, make copies of, photograph, or take extracts from, the document or thing, at the reasonable time, date and place the tribunal decides.

**78 Offences—hearings**

- (1) A person served with an attendance notice must not—

- (a) fail, without reasonable excuse, to attend as required by the notice; or
- (b) fail, without reasonable excuse, to continue to attend as required by the chairperson until excused from further attendance.

Maximum penalty—40 penalty units.

(2) A person appearing as a witness at the hearing must not—

- (a) fail to take an oath or make an affirmation when required by the chairperson; or
- (b) fail, without reasonable excuse, to answer a question the person is required to answer by a tribunal member; or
- (c) fail, without reasonable excuse, to produce a document or thing the person is required to produce by an attendance notice.

Maximum penalty—40 penalty units.

## **79 Self incrimination**

It is a reasonable excuse for a person to fail to answer a question or to produce a document if answering the question or producing the document might tend to incriminate the person.

## **80 False or misleading information**

(1) A person must not—

- (a) state anything to the tribunal that the person knows is false or misleading in a material particular; or
- (b) omit from a statement made to the tribunal anything without which the statement is, to the person's knowledge, misleading in a material particular.

Maximum penalty—40 penalty units.

(2) A complaint against a person for an offence against subsection (1)(a) or (b) is sufficient if it states the statement made was false or misleading to the person's knowledge.

**81 False or misleading documents**

(1) A person must not give to the tribunal a document containing information the person knows is false, misleading or incomplete in a material particular.

Maximum penalty—40 penalty units.

(2) Subsection (1) does not apply to a person who, when giving the document—

- (a) informs the tribunal, to the best of the person's ability, how it is false, misleading or incomplete; and
- (b) gives the correct information to the tribunal if the person has, or can reasonably obtain, the correct information.

(3) A complaint against a person for an offence against subsection (1) is sufficient if it states the document was false, misleading or incomplete to the person's knowledge.

**82 Contempt of tribunal**

A person must not—

- (a) insult the tribunal or a tribunal member; or
- (b) deliberately interrupt the tribunal's hearing of the retail tenancy dispute; or
- (c) create or continue or join in creating or continuing, a disturbance in or near a place where the tribunal is conducting the hearing; or
- (d) do anything that would be contempt of court if the tribunal were a judge acting judicially.

Maximum penalty—100 penalty units.

*Division 5—Provisions about tribunal orders***83 Tribunals' orders**

(1) Subject to subsection (3), the tribunal may make the orders the tribunal considers to be just to resolve the retail tenancy dispute.

(2) Without limiting subsection (1), the tribunal may make any 1 or more of the following orders—

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- (a) an order for a party to the dispute to do, or not to do, anything (an **“enforcement order”**);
- (b) an order requiring a party to the dispute to pay an amount (including an amount of compensation) to a specified person (a **“payment order”**);
- (c) an order that a party to the dispute is not required to pay an amount to a specified person;
- (d) an order setting aside the mediation agreement between the parties to the dispute;
- (e) an order that an item, or part of an item, of the lessor’s outgoings for the retail shopping centre or leased building in which the leased shop is situated was or was not reasonably incurred in, or directly attributable to, the operations, maintenance or repair of the centre or building;
- (f) if the dispute is about the payment of compensation by the lessor to the lessee under the retail shop lease and the lease contains provision for the amount of compensation payable or a formula to calculate the amount of compensation payable—an order that the amount of compensation payable under the lease is reasonable;
- (g) an order giving effect to a settlement agreed on by the parties to the dispute;
- (h) an order mentioned in section 22E(2).<sup>17</sup>

(3) If the tribunal finds a party to the dispute engaged in unconscionable conduct in connection with the retail shop lease, the tribunal may only make 1 of the following orders based on the unconscionable conduct—

- (a) an order requiring the party who engaged in the unconscionable conduct to pay an amount to a stated person;
- (b) an order that the party who engaged in the unconscionable conduct is not required to pay any amount to any person.

(4) An order may specify a time for compliance with it.

(5) If the person against whom the order is made is not present when the order is made, the chief executive must serve a copy of the order on the person as soon as practicable after it is made.

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<sup>17</sup> Section 22E (Effect of failure to comply with sections 22A–22D)

## **84 Enforcement of certain tribunal orders**

(1) This section applies if the tribunal makes an enforcement order.

(2) The person in whose favour the order is made may enforce the order by—

(a) filing in the Supreme Court's registry—

(i) a copy of the order certified by the chief executive to be a true copy; and

(ii) the person's affidavit about the failure of the person against whom the order is made to comply with the order; and

(b) serving a copy of each of the documents mentioned in paragraph (a) on the person against whom the order was made.

(3) If the registrar of the Supreme Court is satisfied there has been, and still exists, a failure to comply with the order, the registrar must endorse a certificate of noncompliance on the copy of the order.

(4) The endorsed order is taken to be a properly entered order of the Supreme Court and may be enforced accordingly.

(5) A court fee is not payable for the filing or endorsement of the order.

## **85 Orders requiring payments**

(1) In this section—

**“appropriate court”** for an order to which this section applies means the court having jurisdiction to order the payment of the amount required to be paid by the order.

(2) This section applies if the tribunal makes a payment order.

(3) The order may be made to take effect immediately or on the failure of a party to comply with another order made by the tribunal.

(4) The person to whom payment is to be made under the order may enforce the order—

(a) by filing in the appropriate court's registry nearest the place where the person ordered to make the payment lives or carries on business—

(i) a copy of the order certified by the chief executive to be a true copy; and

(ii) the person's affidavit about the failure to pay the amount under the order; and

(b) by serving a copy of each of the documents mentioned in paragraph (a) on the person against whom the order was made.

(5) If the registrar of the court is satisfied there has been, and still exists, a failure to comply with the order, the registrar must endorse a certificate of noncompliance on the copy of the order.

(6) The endorsed order is taken to be a properly entered judgment of the court and may be enforced accordingly.

(7) A court fee is not payable for the filing or endorsement of the order.

## **86 Orders of tribunal to be complied with**

A person must not, without reasonable excuse, fail to comply with the tribunal's order.

Maximum penalty—100 penalty units.

## **87 Tribunal's order final and binding**

The tribunal's order is final and binding on each party to the retail tenancy dispute, whether or not the party has appeared or been represented at the tribunal's hearing.

## **87A Order to state reasons**

(1) The tribunal's order must state the reasons for the tribunal's decision on which the order is based.

(2) Without limiting subsection (1), if the retail tenancy dispute includes, or is about, an allegation that a party to the dispute engaged in unconscionable conduct in connection with the retail shop lease, the order must—

(a) state the tribunal's decision relating to the allegation; and

(b) clearly identify any part of the order that is based on the decision.



**88 Restricted right to question tribunal's hearing and order**

(1) Subject to subsection (2), the tribunal's hearing of the retail tenancy dispute and the tribunal's order must not be questioned in a proceeding other than a proceeding based solely on either or both of the following grounds—

- (a) the tribunal had or has no jurisdiction, or has exceeded its jurisdiction, in the hearing or in making the order;
- (b) there has been a denial of natural justice.

(2) If the dispute includes an allegation that a party to the dispute engaged in unconscionable conduct in connection with the retail shop lease, a party to the dispute may appeal to the Supreme Court against any part of the order that is based on the tribunal's decision relating to the allegation.

(3) An appeal under subsection (2) may be made on a matter of law or fact.

(4) A party to the dispute may appeal under subsection (2) only with the court's leave if the part of the order appealed against—

- (a) is based on the tribunal's decision that the allegation of unconscionable conduct is not proved; or
- (b) is based on the tribunal's decision that the allegation of unconscionable conduct is proved and—
  - (i) does not require the party who is found to have engaged in the unconscionable conduct to pay any amount to any person; or
  - (ii) requires the party who is found to have engaged in the unconscionable conduct to pay an amount of less than \$50 000 to a person.

(5) A party to the dispute may appeal as of right under subsection (2) if the part of the order appealed against is based on the tribunal's decision that the allegation of unconscionable conduct—

- (a) is proved; and
- (b) requires the party who is found to have engaged in the unconscionable conduct to pay an amount of \$50 000 or more to a person.

***Division 6—Renewal of retail tenancy disputes*****89 Application to renew dispute**

(1) This section applies if—

- (a) a tribunal makes an order for a retail tenancy dispute (the “**original order**”); and
- (b) the order is not complied with.

(2) The person in whose favour the original order is made may apply to renew the dispute.

(3) The application must be made to the chief executive in the approved form.

**90 Renewal of dispute**

Within 14 days after the application is properly made, the chief executive must renew the retail tenancy dispute by—

- (a) appointing a tribunal from the tribunal panel to hear the renewed dispute; and
- (b) giving written notice to the tribunal panel members of their appointment to hear the renewed dispute; and
- (c) giving written notice to the parties of—
  - (i) the renewal of the dispute; and
  - (ii) the appointment and composition of the tribunal to hear the dispute.

***Division 7—General*****91 Costs**

(1) This section applies to the costs of the tribunal’s hearing of a retail tenancy dispute.

(2) Unless the tribunal makes an order for costs under subsection (3), each party to the dispute must bear the party’s own costs.

(3) On application by a party, the tribunal may make an order for costs if it is satisfied—

- (a) the dispute is frivolous or vexatious; or
- (b) the party has incurred costs because another party—
  - (i) sought an adjournment of the hearing without giving reasonable notice; or
  - (ii) contravened a procedural requirement; or
  - (iii) sought the inclusion of the party or another person as a party to the dispute.

(4) If a party files, in a registry of the District Court, a document certified by the chief executive to be a true copy of an order for costs, the document may be enforced as an order of the District Court.

(5) If the tribunal makes an order for costs that does not state the amount of the costs, the amount must be decided under the *District Courts Rules 1968* as if the order were an order of the District Court and the hearing were conducted in the District Court.

## **92 Allowance to witness**

A witness who appears before a tribunal in the conduct of the hearing of a retail tenancy dispute is entitled to the allowance prescribed by regulation for attendance at the hearing or, if no allowance is prescribed, the reasonable allowance decided by the chairperson.

## **93 Withdrawal of disputes**

(1) A person may, by written notice given to the chief executive, withdraw a retail tenancy dispute lodged by the person.

(2) The notice may be given before or after a mediator or tribunal has started mediating or hearing the dispute.

(3) If the chief executive has nominated a mediator or appointed a tribunal for the dispute, the chief executive must advise the mediator or tribunal of the withdrawal as soon as practicable after receipt of the notice.

**94 Exclusion of other jurisdictions**

(1) On and after the lodgment of a dispute notice for a retail tenancy dispute, the dispute must not be referred to arbitration or heard by any court.

(2) Subsection (1) does not apply if—

- (a) the dispute is withdrawn;<sup>18</sup> or
- (b) a proceeding about the issue in dispute was started in a court before the dispute notice was lodged and the proceeding has not been removed to a tribunal;<sup>19</sup> or
- (c) an application for an order in the nature of an injunction about the issue in dispute is made to a court; or
- (d) a mediator or tribunal refuses to mediate or hear the dispute because the mediator or tribunal is of the opinion the dispute is not within the jurisdiction of a mediator or tribunal; or
- (e) the mediator can not reach a solution to the dispute and a tribunal does not have jurisdiction to hear the dispute.

(3) For subsection (2)(b), a proceeding is taken to have been started before a court if the lessor has—

- (a) served on the lessee a notice under section 124 of the *Property Law Act 1974*; or
- (b) given to the lessee a notice under section 131 of the *Property Law Act 1974*.

(4) If an application for an order mentioned in subsection (2)(c) is made to a court, the tribunal proceeding for the dispute ends only if the court—

- (a) grants the application; and
- (b) makes an order that is inconsistent with allowing the tribunal proceeding to continue.

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18 Section 93 (Withdrawal of disputes)

19 Section 111(1) (Transfer of hearings between tribunals and courts)

## PART 9—ADMINISTRATION

### *Division 1—Mediators*

#### **95 Mediators**

The Minister may appoint the number of persons the Minister considers necessary to be mediators.

#### **96 Mediators' function**

A mediator's function is to seek to resolve, by mediation, retail tenancy disputes within a mediator's jurisdiction.

#### **97 Mediators' jurisdiction**

(1) A mediator has jurisdiction to mediate retail tenancy disputes, other than a retail tenancy dispute—

- (a) about an issue between the parties that—
  - (i) is the subject of arbitration; or
  - (ii) has been the subject of an award (interim or final) in an arbitration proceeding; or
  - (iii) is before, or has been decided by, a court; or
- (b) about—
  - (i) arrears of rent under a retail shop lease; or
  - (ii) the amount of rent payable under a retail shop lease; or
  - (iii) the amount of a lessor's outgoings under a retail shop lease; or
- (c) under a retail shop lease for the carrying on of the business of a service station if the *Petroleum Retail Marketing Franchise Act 1980* (Cwlth) applies to the carrying on of the business under a franchise agreement within the meaning of that Act.

(2) For subsection (1)(a)(i), a retail tenancy dispute is only the subject of arbitration if the arbitration proceeding has started.

(3) However, a mediator has jurisdiction to mediate a retail tenancy dispute about—

- (a) the procedure for the determination of rent payable under a retail shop lease, but not the actual amount of the rent; or
- (b) the basis on which lessor's outgoings are payable by, and the procedure for charging lessor's outgoings to, a lessee under a retail shop lease, but not the actual amount of the outgoings; or
- (c) whether an item, or part of an item, of the lessor's outgoings for the retail shopping centre or leased building in which a leased shop is situated was reasonably incurred in, or directly attributable to, the operations, maintenance or repair of the centre or building.

## **98 Duration of appointment**

(1) A mediator must be appointed for a term not longer than 3 years.

(2) A mediator may resign by signed notice of resignation given to the Minister.

## **99 Conditions of appointment**

(1) A mediator who is not a member of the public service is to be paid the remuneration and allowances decided by the Governor in Council.

(2) A mediator holds office on the conditions not provided in this Act as are decided by the Minister.

## **100 Removal from office**

The Minister may remove a mediator from office, by written notice given to the mediator, if the Minister is satisfied the mediator—

- (a) is incapable of properly discharging the functions of a mediator;  
or
- (b) is unfit to hold the office.

**101 Annual reports**

(1) Within 2 months after the end of each financial year, a mediator must report to the chief executive on the mediator's discharge of the function in the year.

(2) The report must include details of all matters that—

- (a) the mediator becomes aware of during the discharge of the mediator's function; and
- (b) significantly affect relationships between lessors and lessees under retail shop leases.

***Division 2—Retail shop leases tribunals******Subdivision 1—Tribunal panel and members*****102 Appointment of members of tribunal panel**

The Governor in Council may appoint as members of a panel of retail shop lease tribunal members (the “**tribunal panel**”)—

- (a) 1 or more persons who—
  - (i) have been Supreme or District Court judges; or
  - (ii) are lawyers of at least 5 years standing; and
- (b) the number of representatives of lessors and lessees under retail shop leases the Governor in Council considers necessary.

**103 Duration of appointment**

(1) A tribunal panel member must be appointed for a term not longer than 3 years.

(2) A tribunal panel member may resign by signed notice of resignation given to the Minister.

**104 Conditions of appointment**

(1) A tribunal panel member is to be paid the remuneration and allowances decided by the Governor in Council.

(2) A tribunal panel member holds office on the conditions not provided in this Act as are decided by the Governor in Council.

### **105 Removal from office**

The Governor in Council may remove a tribunal panel member from office, by written notice given to the member, if the member—

- (a) is incapable of properly discharging the functions of a tribunal member; or
- (b) is unfit to hold the office.

### *Subdivision 2—Composition, functions, jurisdiction and powers of tribunals*

### **106 Composition of retail shop lease tribunals**

A tribunal is to consist of the following tribunal members—

- (a) a person appointed under section 102(a); and
- (b) a representative of lessors under retail shop leases; and
- (c) a representative of lessees under retail shop leases.

### **107 Chairperson**

The tribunal member mentioned in section 106(a) is the chairperson of the tribunal to which the member is appointed.

### **108 Tribunals' function**

A tribunal's function is to hear retail tenancy disputes that—

- (a) are within a tribunal's jurisdiction; and
- (b) it is appointed to hear.

### **109 Tribunals' jurisdiction**

(1) A tribunal has jurisdiction to hear retail tenancy disputes, other than a retail tenancy dispute—



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- (a) about an issue between the parties that—
  - (i) is the subject of arbitration; or
  - (ii) has been the subject of an award (interim or final) in an arbitration proceeding; or
  - (iii) is before, or has been decided by, a court; or
- (b) about—
  - (i) arrears of rent under a retail shop lease; or
  - (ii) the amount of rent payable under a retail shop lease; or
  - (iii) the amount of a lessor's outgoings under a retail shop lease; or
- (c) if the amount, value or damages in dispute is more than the monetary limit of a District Court within the meaning of section 66<sup>20</sup> of the *District Courts Act 1967*; or
- (d) under a retail shop lease for the carrying on of the business of a service station.

(2) For subsection (1)(a)(i), a retail tenancy dispute is only the subject of arbitration if the arbitration proceeding has started.

(3) However, a tribunal has jurisdiction to hear a retail tenancy dispute about—

- (a) the procedure for the determination of rent payable under a retail shop lease, but not the actual amount of the rent; or
- (b) the basis on which lessor's outgoings are payable by, and the procedure for charging lessor's outgoings to, a lessee under a retail shop lease, but not the actual amount of the outgoings; or
- (c) whether an item, or part of an item, of the lessor's outgoings for the retail shopping centre or leased building in which a leased shop is situated was reasonably incurred in, or directly attributable to, the operations, maintenance or repair of the centre or building.

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<sup>20</sup> Section 66 was renumbered as section 68 under the *District Court Act 1967*, section 112.

**110 Tribunals' general powers**

(1) A tribunal may do all things necessary or convenient to be done for, or in relation to, the performance of its function.

(2) Without limiting subsection (1), a tribunal has the powers conferred on it by this Act.

(3) Without limiting subsection (1), a tribunal may make, or cause to be made, the investigations it considers necessary for its hearings, including, for example, investigations about current market management costs and fees for the retail shopping industry.

**111 Transfer of hearings between tribunals and courts**

(1) If a proceeding about a retail tenancy dispute is started in a court and a tribunal has jurisdiction to hear the dispute, the court may, on the application of a party, order that the proceeding be removed to a tribunal.

(2) If a tribunal is of the opinion that a retail tenancy dispute being, or about to be, heard by the tribunal should be heard by a court, the tribunal may order that the dispute be removed, in whole or part, to a court.

***Subdivision 3—Annual reports*****112 Reports on discharge of tribunals' function**

(1) Within 2 months after the end of each financial year, the chairperson must give a report to the chief executive on each tribunal's discharge of its function throughout the year.

(2) The report must include details of all matters that—

- (a) the chairperson becomes aware of during the discharge of the tribunals' function; and
- (b) significantly affect relationships between lessors and lessees under retail shop leases.

***Division 3—Confidentiality, privilege and immunity*****113 Mediators and tribunal members to maintain secrecy**

(1) A mediator or tribunal member must not disclose information coming to the knowledge of the mediator or member during the dispute resolution process.

Maximum penalty—100 penalty units.

(2) However, a mediator or tribunal member may disclose information—

- (a) with the agreement of all parties to the dispute resolution process; or
- (b) for statistical purposes without revealing the identity of any person about whom the information is relevant; or
- (c) for an inquiry or proceeding about an offence or other misconduct that happens during the dispute resolution process; or
- (d) under a requirement under an Act.

**114 Ordinary protection and immunity allowed**

(1) A mediator or tribunal member has, in the performance of the mediator's or member's function, the same protection and immunity as a Supreme Court judge carrying out the functions of a judge.

(2) A person who is—

- (a) a party, or the party's agent, appearing at a dispute resolution process for a retail tenancy dispute; or
- (b) a witness attending a hearing of a retail tenancy dispute by a tribunal;

has the same protection and immunity the person would have if the dispute were in the Supreme Court.

(3) A document produced at, or used for, a dispute resolution process has the same protection during the process it would have if produced before the Supreme Court.

**115 Admissions made during dispute resolution process**

(1) Evidence of anything said in a mediation conference for a retail tenancy dispute is not admissible in any proceeding before any court or a tribunal.

(2) Evidence of anything said in a tribunal's hearing of a retail tenancy dispute is not admissible in any proceeding before any court.

***Division 4—General*****116 Register**

(1) The chief executive must keep a register of mediators, tribunal panel members and retail tenancy disputes.

(2) The register of retail tenancy disputes must contain the following details for each dispute—

- (a) the date the dispute notice was lodged;
- (b) the names of the parties;
- (c) the subject matter of the dispute;
- (d) the results of the mediation process;
- (e) the results of the tribunal's hearing, including any tribunal order.

(3) The chief executive must—

- (a) keep the register open for inspection by members of the public during office hours on business days at the department's head office; and
- (b) permit a person to take extracts from the register or, on payment of the appropriate fee by a person, give the person a copy of the register or part of it.

(4) The fee for a copy of the register or part of it is the amount that the chief executive considers to be reasonable is not more than the reasonable cost of making the copy.

**117 Delegations**

(1) The Minister may delegate the Minister's powers under this Act to an officer of the public service.

(2) The chief executive may delegate the chief executive's powers under this Act to an officer of the public service.

### **118 Chief executive may approve forms**

The chief executive may approve forms for use under this Act.

### **119 Chief executive's responsibility**

For the efficient and proper administration of this Act, the chief executive—

- (a) is responsible for ensuring lessors and lessees under retail shop leases are advised about the practices and procedures of the department, mediators and tribunals; and
- (b) may advise lessors and lessees under retail shop leases about potential retail tenancy disputes.

## **PART 10—MISCELLANEOUS**

### **120 Evidentiary provisions**

(1) This section applies to a proceeding for an offence against this Act.

(2) A signature purporting to be that of the chief executive is evidence of the signature it purports to be.

(3) A certificate purporting to be signed by the chief executive about a tribunal's order is evidence of the matters stated in it.

(4) A document purporting to be a copy of a notice required or authorised by this Act to be given is evidence of the particulars in the original notice of which it purports to be a copy.

### **121 Regulations**

(1) The Governor in Council may make regulations under this Act.

(2) A regulation may be made about—

- (a) the fees payable under this Act; and

(b) the practices and procedures of the dispute resolution process;  
and

(c) the enforcement of tribunal orders.

(3) A regulation may create offences and prescribe penalties of not more than 50 penalty units for the offences.

## **122 Review of Act**

(1) The Minister must carry out reviews of the operation of this Act to decide whether its provisions remain appropriate.

(2) A review must be carried out within 5 years after the commencement of this Act and afterwards at intervals of not more than 5 years after the previous review.

(3) The Minister must prepare a report on each review and table a copy of the report in the Legislative Assembly as soon as practicable after it is prepared.

## **PART 12—TRANSITIONAL PROVISIONS**

### *Division 1—Transitional provisions for Act No. 47 of 1994*

#### **123 Retail Shop Leases Act 1984 references**

In an Act, a reference to the *Retail Shop Leases Act 1984* may, if the context permits, be taken to be a reference to this Act.

### *Division 2—Transitional provisions for 2000 amendment Act*

#### **124 Obligations to give disclosure statements and financial and legal advice certificates**

(1) If, before the commencement of this section, a lessor has given a prospective lessee a disclosure statement for a retail shop lease under section 22 as it existed before the commencement—

- (a) the lessor is taken to have complied with section 22(1)<sup>21</sup> as it existed after the commencement; and
- (b) the prospective lessee is taken to have complied with sections 22A and 22D(1).<sup>22</sup>

(2) If, before the commencement of this section, an assignor has asked a lessor to consent to an assignment of a retail shop lease—

- (a) the assignor is taken to have complied with section 22B(1);<sup>23</sup> and
- (b) the prospective assignee is taken to have complied with sections 22B(2), 22C(2)<sup>24</sup> and 22D(2); and
- (c) the lessor is taken to have complied with section 22C(1).

## **125 Current market rent determinations**

(1) This section applies if—

- (a) before the commencement of this section, the current market rent of a lease is to be determined by a specialist retail valuer; and
- (b) on the commencement, the valuer has not given the determination to the lessor and lessee under section 32.<sup>25</sup>

(2) This Act, as in force immediately before the commencement of this section, applies to the current market rent determination.

## **126 Relocating lessee's business**

(1) This section applies if, within 3 months after the commencement of section 46C,<sup>26</sup> a lessor relocates a lessee's business to other premises during the term of the lease or of any renewal of it.

(2) Section 46C does not apply to the relocation.

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21 Section 22 (Lessor's disclosure obligation to prospective lessee)

22 Sections 22A (Prospective lessee's disclosure obligation to lessor) and 22D(Financial, and legal advice certificates)

23 Section 22B (Assignor's and prospective assignee's disclosure obligations to each other)

24 Section 22C (Lessor's and prospective assignee's disclosure obligations to each other)

25 Section 32 (Valuer to give determination to lessor and lessee)

26 Section 46C (Relocating lessee's business)

**127 Resolution for changing core trading hours**

(1) This section applies if, immediately before the commencement of this section, a secret ballot has not been conducted for a notice given under section 52<sup>27</sup> before the commencement about a resolution to change core trading hours for a retail shopping centre.

(2) The secret ballot must be conducted and decided under section 52 as in force immediately before the commencement of this section.

**128 Existing retail tenancy disputes**

If, on the commencement of this section, a retail tenancy dispute referred to the chief executive before the commencement has not been resolved, the dispute must be resolved under part 8<sup>28</sup> as in force immediately before the commencement of this section.

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27 Section 52 (Requirements for resolution)

28 Part 8 (Retail tenancy dispute resolution)



## ENDNOTES

### 1 Index to endnotes

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### 2 Date to which amendments incorporated

This is the reprint date mentioned in the Reprints Act 1992, section 5(c). Accordingly, this reprint includes all amendments that commenced operation on or before 1 March 2002. Future amendments of the Retail Shop Leases Act 1994 may be made in accordance with this reprint under the Reprints Act 1992, section 49.

### 3 Key

#### Key to abbreviations in list of legislation and annotations

Key	Explanation	Key	Explanation
AIA	= Acts Interpretation Act 1954	prev	= previous
amd	= amended	(prev)	= previously
amdt	= amendment	proc	= proclamation
ch	= chapter	prov	= provision
def	= definition	pt	= part
div	= division	pubd	= published
exp	= expires/expired	R[X]	= Reprint No.[X]
gaz	= gazette	RA	= Reprints Act 1992
hdg	= heading	reloc	= relocated
ins	= inserted	renum	= renumbered
lap	= lapsed	rep	= repealed
notfd	= notified	s	= section
o in c	= order in council	sch	= schedule
om	= omitted	sdiv	= subdivision
orig	= original	SIA	= Statutory Instruments Act 1992
p	= page	SIR	= Statutory Instruments Regulation 1992
para	= paragraph	SL	= subordinate legislation
prec	= preceding	sub	= substituted
pres	= present	unnum	= unnumbered

## 4 Tables in earlier reprints

### TABLES IN EARLIER REPRINTS

Name of table	Reprint No.
Corrected minor errors	3

## 5 Table of earlier reprints

### TABLE OF EARLIER REPRINTS

[If a reprint number includes a roman letter, the reprint was released in unauthorised, electronic form only.]

Reprint No.	Amendments included	Reprint date
1	none	1 November 1994
2	to Act No. 57 of 1995	19 February 1996
2A	to Act No. 23 of 1999	27 August 1999
2B	to Act No. 19 of 2000	14 July 2000
3	to Act No. 19 of 2000	3 August 2000

## 6 List of legislation

### **Retail Shop Leases Act 1994 No. 47**

date of assent 14 September 1994

ss 1–2 commenced on date of assent

remaining provisions commenced 28 October 1994 (1994 SL No. 386)

amending legislation—

### **Statute Law (Minor Amendments) Act (No. 2) 1995 No. 51 ss 1, 4 sch**

date of assent 22 November 1995

commenced on date of assent

### **Statute Law Revision Act 1995 No. 57 ss 1–2, 4 sch 2**

date of assent 28 November 1995

commenced on date of assent

### **Retail Shop Leases Amendment Act 1999 No. 23**

date of assent 30 April 1999

commenced on date of assent

### **Retail Shop Leases Amendment Act 2000 No. 19**

date of assent 23 June 2000

ss 1–2 commenced on date of assent

s 22 commenced 24 June 2001 (automatic commencement under AIA s 15DA(2))

remaining provisions commenced 1 July 2000 (2000 SL No. 171)

**Duties Act 2001 No. 71 ss 1–2(1), 551 sch 1**

date of assent 13 November 2001

ss 1–2 commenced on date of assent

remaining provisions commenced 1 March 2002 (2002 SL No. 10)

**7 List of annotations****Commencement**

s 2 om R2 (see RA s 37)

**Definitions**

s 5 def “**2000 amendment Act**” ins 2000 No. 19 s 4(2)  
 def “**approved accounting standards**” amd 2000 No. 19 s 4(3)  
 def “**approved auditor**” amd 2000 No. 19 s 4(3)  
 def “**attendance notice**” amd 2000 No. 19 s 37  
 def “**common areas**” amd 2000 No. 19 s 37  
 def “**disclosure statement**” sub 2000 No. 19 s 4(1)–(2)  
 def “**dispute notice**” amd 2000 No. 19 s 37  
 def “**dispute resolution process**” amd 2000 No. 19 s 37  
 def “**enforcement order**” amd 2000 No. 19 s 37  
 def “**entered into**” ins 2000 No. 19 s 4(2)  
 def “**GST**” ins 2000 No. 19 s 4(2)  
 def “**GST Act**” ins 2000 No. 19 s 4(2)  
 def “**maintenance amounts**” amd 2000 No. 19 s 37  
 def “**mediation**” amd 2000 No. 19 s 37  
 def “**mediation agreement**” amd 2000 No. 19 s 37  
 def “**mediation conference**” amd 2000 No. 19 s 37  
 def “**original order**” amd 2000 No. 19 s 37  
 def “**outgoings**” amd 2000 No. 19 s 37  
 def “**payment order**” amd 2000 No. 19 s 37  
 def “**promotion amounts**” amd 2000 No. 19 s 37  
 def “**renewed retail tenancy dispute**” amd 2000 No. 19 s 37  
 def “**retail shopping centre**” amd 2000 No. 19 s 37  
 def “**specific outgoings**” sub 2000 No. 19 s 4(1)–(2)  
 def “**tribunal legal member**” ins 2000 No. 19 s 4(2)  
 def “**tribunal panel**” amd 2000 No. 19 s 37  
 def “**turnover**” amd 2000 No. 19 s 37

**Meaning of “outgoings”**

s 7 amd 2000 No. 19 s 5

**Meaning of “turnover”**

s 9 amd 2000 No. 19 s 6

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**Application of Act to existing leases in exempt enterprises**

s 16            amd 2000 No. 19 s 37

**Application of Act to leases of service stations**

s 17            amd 2000 No. 19 s 37

**Application of part**

s 21            amd 2000 No. 19 s 8

**Lessor's disclosure obligation to prospective lessee**

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s 22            amd 2000 No. 19 s 9(2)–(5)

**Prospective lessee's disclosure obligation to lessor**

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**Assignor's and prospective assignee's disclosure obligations to each other**

s 22B        ins 2000 No. 19 s 10

**Lessor's and prospective assignee's disclosure obligations to each other**

s 22C        ins 2000 No. 19 s 10

**Financial, and legal advice certificates**

s 22D        ins 2000 No. 19 s 10

**Effect of failure to comply with sections 22A–22D**

s 22E        ins 2000 No. 19 s 10

**Lessee's obligations to make particular payments**

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s 24            amd 2000 No. 19 ss 11(2)–(5), 37

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**Timing and bases of rent reviews**

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s 27            amd 1999 No. 23 s 3(2)–(6); 2000 No. 19 s 13

**Valuer may require information from lessor**

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**Requirements when lessee to pay lessor's outgoings**

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**Lessor's recovery of electricity charges**

s 37A          ins 2000 No. 19 s 18

**Promotion and advertising**

s 41            amd 2000 No. 19 s 19

**Compensation provisions implied in certain leases**

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**When compensation is payable**

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**Lessee's right to deal with lease and business assets**

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**Unconscionable conduct**

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**Matters tribunal may consider in deciding if a party's conduct is unconscionable**

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**Order to state reasons**

s 87A ins 2000 No. 19 s 32

**Restricted right to question tribunal's hearing and order**

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