

South Australia

## **Retail and Commercial Leases Act 1995**

An Act regulating the leasing of certain retail shops; to amend the *Landlord and Tenant Act 1936*; and for other purposes.

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### **Contents**

#### Part 1—Preliminary

- 1 Short title
- 3 Interpretation
- 4 Application of Act
- 5 This Act overrides leases
- 6 When the lease is entered into

#### Part 2—Administration

- 7 Administration of Act
- 8 Ministerial control of administration
- 9 Commissioner's functions
- 10 Immunity from liability

#### Part 3—Before the lease is entered into

- 11 Copy of lease to be provided at negotiation stage
- 12 Lessee to be given disclosure statement
- 13 Certain obligations to be void
- 14 Lease preparation costs
- 15 Premium prohibited
- 16 Lease documentation
- 18 Warranty of fitness for purpose

#### Part 4—Security

- 19 Security bond
- 20 Repayment of security

#### Part 4A—Term of lease and renewal

##### Division 1—Preliminary

- 20A Objects

##### Division 2—Initial term of lease

- 20B Minimum 5 year term

## Division 3—Renewal of shopping centre leases

### Subdivision 1—Application of this Division

20C Application of Division

### Subdivision 2—Rules of conduct at end of term

- 20D Preference to be accorded to existing lessee
- 20E Implementation of preferential right
- 20F Notice of absence of right of preference
- 20G Consequences of failing to begin negotiations or give notice

### Subdivision 3—Remedies for non-compliance with rules

20H Fair dealing between lessor and lessee in regard to renewal of lease

## Division 4—Other cases

- 20I Application of this Division
- 20J Notice to lessee of lessor's intentions at end of lease

## Division 5—General provisions

- 20K Certified exclusionary clause
- 20L Premium for renewal or extension prohibited
- 20M Unlawful threats
- 20N Exclusion of legal consequences for which express provision is not made

## Part 5—Rent and outgoings

- 21 Payment of rent when lessor's fitout not completed
- 22 Restrictions on adjustment of base rent
- 23 Reviews to current market rent
- 24 Turnover rent
- 26 Recovery of outgoings from lessee
- 29 Sinking fund for major repairs and maintenance
- 30 Land tax not to be recovered from lessee
- 31 Estimates and explanations of outgoings to be provided by lessor
- 32 Lessor to provide auditor's report on outgoings
- 33 Adjustment of contributions to outgoings based on actual expenditure properly and reasonably incurred
- 34 Non-specific outgoings contribution limited by ratio of lettable area
- 35 Determination of current market rent under options to renew
- 36 Opportunity for lessee to have current market rent determined early

## Part 6—Alterations and other interference with the shop

- 37 Lessee to be given notice of alterations and refurbishment
- 38 Lessee to be compensated for disturbance
- 39 Demolition
- 40 Damaged premises
- 41 Employment restriction

## Part 7—Assignment and termination

- 43 Grounds on which consent to assignment can be withheld
- 44 Premium on assignment prohibited
- 45 Procedure for obtaining consent to assignment

---

45A	Liability of lessee following assignment of lease
46	Lessor may reserve right to refuse sublease, mortgage
<b>Part 8—Additional requirements for retail shopping centres</b>	
50	Part applies only to retail shopping centres
51	Confidentiality of turnover information
52	Statistical information to be made available to lessee
53	Advertising and promotion requirements
54	Marketing plan for advertising and promotion
55	Lessor to provide auditor's report on advertising and promotion expenditure
56	Unexpended advertising and promotion contributions to be carried forward
57	Relocation
58	Termination for inadequate sales prohibited
59	Geographical restrictions
60	Associations representing lessees
61	Trading hours
62	Special provision for strata and community shopping centres
62A	Casual Mall Licensing Code
<b>Part 9—Dispute resolution</b>	
<b>Division 1—Mediation</b>	
63	Responsibility of the Commissioner to arrange for mediation of disputes
64	Mediation of disputes
65	Stay of proceedings
66	Statements made during mediation
<b>Division 2—Intervention</b>	
67	Power to intervene
<b>Division 3—Jurisdiction of the Magistrates Court</b>	
68	Jurisdiction of the Magistrates Court
69	Substantial monetary claims
<b>Part 10—Retail Leases Fund</b>	
70	The Fund
71	Application of income
72	Accounts and audit
<b>Part 11—Retail Shop Leases Advisory Committee</b>	
73	Advisory Committee
74	Functions of Advisory Committee
<b>Part 12—Miscellaneous</b>	
75	Vexatious acts
76	Abandoned goods
77	Exemptions
78	Annual reports
79	Time for prosecutions
80	Regulations
81	Amendment of the Landlord and Tenant Act

## Schedule—Casual Mall Licensing Code

- 1 Interpretation
- 2 Casual mall licence policy
- 3 Provision of information
- 4 Obligations of lessor relating to casual mall licence policy
- 5 Sightlines to shopfront
- 6 Competitors
- 7 Special events
- 8 Adjustment of outgoings
- 9 Rectification of certain breaches

## Legislative history

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### The Parliament of South Australia enacts as follows:

## Part 1—Preliminary

### 1—Short title

This Act may be cited as the *Retail and Commercial Leases Act 1995*.

### 3—Interpretation

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

*accounting period* means a period fixed as an accounting period in a retail shop lease;

*certified exclusionary clause*—see section 20K;

*collateral agreement* includes a guarantee under which the guarantor guarantees the performance of the obligations of a lessee under a retail shop lease;

*Commissioner* means the Commissioner for Consumer Affairs;

*core trading hours* means the hours for which a retail shop is required under a retail shop lease to be kept open for business;

*demolition* of a building of which a retail shop forms part includes a substantial repair, renovation or reconstruction of the building that cannot be carried out practicably without vacant possession of the shop;

*disclosure statement*—see section 12;

*enclosed shopping complex* means a group of three or more retail shops under common ownership or management with a common area through which public access is obtained to all or some of the shops and which is locked to prevent public access through that area when those shops are closed for business;

*Fund* means the Retail Shop Leases Fund;

*lawyer* means a person entitled to practise the profession of law in the State;

*lessee* means the person who has the right to occupy a retail shop under a retail shop lease, and includes—

- (a) a sublessee; and

- (b) a prospective lessee or a former lessee;

**lessor** means the person who grants or proposes to grant the right to occupy a retail shop under a retail shop lease, and includes—

- (a) a sublessor; and  
 (b) a prospective lessor or a former lessor;

**Magistrates Court** means the Civil (Consumer and Business) Division of the Magistrates Court;

**mediation** of a dispute includes preliminary assistance in dispute resolution such as the giving of advice to ensure that—

- (a) the parties to the dispute are fully aware of their rights and obligations; and  
 (b) there is full and open communication between the parties about the dispute;

**outgoings** means a lessor's outgoings on account of the expenses of operating, repairing or maintaining the retail shop or a retail shopping centre in which the retail shop is located (including rates, taxes, levies, premiums or charges payable by the lessor) but does not include outgoings which are directly proportional to the level of a lessee's consumption or use and for which the lessee is required to reimburse the lessor under the lease;

**party** means the lessor or the lessee under a retail shop lease;

**premium** means money paid, or a benefit given, to or as directed by the lessor or the lessor's agent in connection with the granting, renewal, extension or assignment of a lease (and a reference in this Act to the payment of a premium extends to giving a benefit);

**Registrar** means the Principal Registrar of the Magistrates Court of South Australia;

**renewal** of a retail shop lease extends to the lessor and the lessee entering into a new retail shop lease for the retail shop (whether on the same or different terms);

**retail shop** means—

- (a) business premises—  
     (i) at which goods are sold to the public by retail; or  
     (ii) at which services are provided to the public, or to which the public is invited to negotiate for the supply of services; or  
 (b) business premises classified by regulation as premises to which this Act applies,

but does not include business premises of a class excluded by regulation from the ambit of this definition;

**retail shop lease** or **lease** means an agreement under which a person grants or agrees to grant to another person for value a right to occupy a retail shop for carrying on a business—

- (a) whether or not the right is a right of exclusive occupation; and  
 (b) whether the agreement is express or implied; and

- (c) whether the agreement is oral or in writing, or partly oral and partly in writing;

**retail shopping centre** means a cluster of premises with the following attributes:

- (a) at least five of the premises are retail shops; and
- (b) the premises are all owned by the same person, or have (or would if leased have) the same lessor or the same head lessor, or comprise lots within the same community plan under the *Community Titles Act 1996* or units within the same strata plan under the *Strata Titles Act 1988*; and
- (c) the premises are located in the one building or in two or more buildings that are either adjoining or separated only by common areas or other areas owned by the owner of the premises; and
- (d) the cluster of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade;

**statutory rights of security of tenure** means the rights conferred on a lessee by Part 4A Division 2 and, if the retail shop lease relates to premises in a retail shopping centre, by Part 4A Division 3.

- (2) In the interpretation of this Act, accepted practices and interpretations in the industry concerning the leasing of retail shops are to be taken into account.

#### 4—Application of Act

- (1) This Act applies to a retail shop lease if the premises to which the lease applies consist of a retail shop or a retail shop together with an adjacent dwelling.
- (2) However, this Act does not apply to a retail shop lease if—
  - (a) the rent payable under the lease exceeds \$250 000 per annum or, if a greater amount is prescribed by regulation, that other amount; or
  - (ab) the lease is for a term of 1 month or less; or
  - (b) the right of occupation arises under—
    - (i) an agreement for the sale and purchase of premises; or
    - (ii) a mortgage; or
    - (iii) a scheme under which a group of adjacent premises is owned by a company and the premises comprising the group are let by the company to persons who jointly have a controlling interest in the company; or
  - (c) the lessee is—
    - (i) a public company or a subsidiary of a public company; or
    - (ii) an ADI; or
    - (iii) a body corporate authorised by law to carry on the business of insurance; or
    - (iv) the Crown or an agency or instrumentality of the Crown in right of the State, another State or Territory, or the Commonwealth; or

- (v) a municipal or district council or other authority with powers and functions of local government.
- (3) The regulations may exclude from the application of this Act (either conditionally or unconditionally) a specified class of retail shop leases.

### **5—This Act overrides leases**

- (1) This Act operates despite the provisions of a lease.
- (2) A provision of a lease or a collateral agreement is void to the extent that the provision is inconsistent with this Act.

### **6—When the lease is entered into**

For the purposes of this Act, a retail shop lease is taken to have been entered into when—

- (a) both parties have executed the lease; or
- (b) a person enters into possession of the retail shop as lessee under the lease; or
- (c) a person begins to pay rent as lessee under the lease or proposed lease (but not if the payment is an advance payment of rent made to secure the premises),

(whichever happens first).

## **Part 2—Administration**

### **7—Administration of Act**

The Commissioner is responsible for the administration of this Act.

### **8—Ministerial control of administration**

The Commissioner is, in the administration of this Act, subject to control and direction by the Minister.

### **9—Commissioner's functions**

The Commissioner has the following functions:

- (a) investigating and researching matters affecting the interests of parties to retail shop leases; and
- (b) publishing reports and information on subjects of interest to the parties to retail shop leases; and
- (c) giving advice (to an appropriate extent) on the provisions of this Act and other subjects of interest to the parties to retail shop leases; and
- (d) investigating suspected infringements of this Act and taking appropriate action to enforce this Act; and
- (e) making reports to the Minister on questions referred to the Commissioner by the Minister and other questions of importance affecting the administration of this Act; and
- (f) administering the Fund.

## 10—Immunity from liability

No liability attaches to the Commissioner or any other person acting in the administration of this Act for an honest act or omission in the exercise or purported exercise of functions under this Act.

## Part 3—Before the lease is entered into

### 11—Copy of lease to be provided at negotiation stage

A person must not, as lessor or on behalf of the lessor, offer to enter into a retail shop lease, invite an offer to enter into a retail shop lease or indicate by written or broadcast advertisement that a retail shop is for lease, unless—

- (a) the person has a copy of the proposed retail shop lease (in written form, but not necessarily including particulars of the lessee, the rent or the term of the lease) available for inspection by a prospective lessee; and
- (b) the person makes a copy of the proposed lease available to any prospective lessee as soon as the person enters into negotiations with the prospective lessee concerning the lease.

Maximum penalty: \$500.

### 12—Lessee to be given disclosure statement

- (1) Before a retail shop lease is entered into or renewed, the lessee must be given a disclosure statement for the lease.
- (2) A disclosure statement is a written document stating or containing—
  - (a) the address of the shop; and
  - (b) the lettable area of the shop; and
  - (c) the permitted uses of the shop; and
  - (d) the term of the lease; and
  - (e) the hours during which the lessee will have access to the shop outside trading hours; and
  - (f) the date on which the shop will be available for occupation; and
  - (g) the amount of the base rent payable under the lease and the basis on which the base rent may be changed; and
  - (h) any other rent payable under the lease and the basis of its calculation; and
  - (i) each category of outgoings the lessee is to be liable to pay or reimburse (in whole or part), and an estimate of the lessee's annual liability for outgoings of each category; and
  - (j) whether the amount the lessee is required to pay towards outgoing includes a margin of profit for the lessor and, if so, the percentage profit or the basis on which the profit is to be calculated; and
  - (k) the nature of any other monetary obligations imposed on the lessee under the lease and, if possible, an estimate of the annual cost of complying with those obligations; and



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- (l) whether any right to renew or extend the term of the lease is given by the lease and, if so, the nature of the right; and
  - (m) the legal consequences of breach of a term of the lease (including the consequences of early termination of the lease by the lessee); and
  - (n) a warning that oral representations made by the lessor or the lessor's agent on which the lessee has relied should be reduced to writing and signed by or on behalf of the lessor before the lessee enters into the lease; and
  - (o) a warning that the lessee should obtain independent legal and financial advice before entering into the lease.
- (3) If the shop is situated in a retail shopping centre, the disclosure statement must also state—
- (a) the address of the retail shopping centre; and
  - (b) the number of shops in the retail shopping centre and their total lettable area; and
  - (c) the number of parking bays available for the use of customers of the shop and the number of parking bays available for use by the lessee and the lessee's employees; and
  - (d) the nature of the facilities and services provided by the lessor; and
  - (e) whether changes to the retail shopping centre are proposed and, if so, the nature of the changes; and
  - (f) the core trading hours; and
  - (g) the current tenant mix and any proposed changes to the current tenant mix; and
  - (h) whether the lessor is prepared to give the lessee an assurance that the current tenant mix will not be altered to the lessee's disadvantage by the introduction of a competitor; and
  - (i) whether there is a tenant association and, if so, the nature of the association, the voting rights of members, and the contributions payable by members; and
  - (j) whether contributions are or may be required towards the costs of advertising and promoting the shopping centre and, if so, the estimated annual contribution to be required from the lessee.
- (3a) A disclosure statement must comply with requirements of the regulations about the form in which it is to be presented.
- (4) The tenant should sign an acknowledgement of receipt of the disclosure statement before signing the lease or a document that binds the lessee to enter into the lease or to take the retail shop on lease for a renewed term.
- (5) If a disclosure statement is not given as required by subsection (1), or contains information that at the time it is given is materially false or misleading, the Magistrates Court may, on application by the lessee, make one or more of the following orders as may be appropriate in the circumstances of the case—
- (a) an order avoiding the lease in whole or part;
  - (b) an order varying the lease;

- (c) an order requiring the lessor to repay money paid by the lessee;
  - (d) an order requiring the lessor to pay compensation to the lessee;
  - (e) an order dealing with incidental or ancillary matters.
- (6) However, an order cannot be made under subsection (5) on the ground that a disclosure statement is incomplete or contains information that is materially false or misleading if—
- (a) the lessor has acted honestly and reasonably and ought reasonably to be excused; and
  - (b) the lessee has not been substantially prejudiced.

### **13—Certain obligations to be void**

- (1) An obligation to make or reimburse capital expenditure may only be imposed by or under a retail shop lease or a collateral agreement in the following cases:
- (a) a lessee may be required to pay or reimburse the cost of making good damage to the premises arising when the lessee is in possession or entitled to possession of the premises; and
  - (b) a lessee may be required to fit or refit the shop, or to provide fixtures, plant or equipment, if the disclosure statement discloses the obligation and contains sufficient details to enable the lessee to obtain an estimate of the likely cost of complying with the obligation; and
  - (c) a lessee may be required to contribute to a sinking fund to cover major items of repair or maintenance if reasonable details of the lessee's obligation are disclosed in the disclosure statement.

An obligation that may be imposed under this subsection is called a *permissible obligation*.

- (2) A provision of a retail shop lease or a collateral agreement under which a lessee is required or may be required to make or reimburse capital expenditure is void unless the obligation imposed by or under the provision is a permissible obligation.
- (3) A provision of a retail shop lease or a collateral agreement under which the lessee is required to compensate the lessor for depreciation of the premises attributable to ordinary wear and tear is void; but this subsection is not intended to prevent such depreciation being taken into account in the calculation, or assessment, of base rent.

### **14—Lease preparation costs**

- (1) If the lessee is liable to pay an amount to the lessor for legal or other expenses incurred by the lessor in connection with the preparation, stamping and registration of a retail shop lease (*preparatory costs*), the lessee cannot be required to make the payment until provided with a copy of any account given to the lessor for the expenses.

*Preparatory costs* include—

- (a) fees charged by a mortgagee for producing a certificate of title for the land over which a retail shop lease is to be registered or for consenting to the lease;

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- (b) the costs of attendances on the lessee by the lessor, or a lawyer or registered conveyancer acting for the lessor.
- (2) The lessee's liability for preparatory costs cannot exceed—
    - (a) the actual amount of the stamp duty payable on the lease and the government fees for registration of the lease; and
    - (b) one-half of the other preparatory costs.
  - (3) However, this section does not limit the recovery of preparatory costs incurred by the lessor from a person who enters into and then withdraws from negotiations with the lessor.

### **15—Premium prohibited**

- (1) A lessor must not seek or accept the payment of a premium in connection with the granting of a retail shop lease and a provision of a retail shop lease is void to the extent that it requires the payment of a premium in connection with the granting of the lease.
- (2) If a lessor or a person acting on behalf of a lessor contravenes this section—
  - (a) the person is guilty of an offence and liable to a penalty not exceeding \$10 000; and
  - (b) the lessee is entitled to recover from the lessor as a debt any payment made or the value of any benefit conferred by the lessee and accepted by or on behalf of the lessor in contravention of this section (whether or not the person is convicted of an offence under paragraph (a)).
- (3) This section does not prevent a lessor—
  - (a) from receiving payment for a right or option to enter into a retail shop lease if, when a retail shop lease is entered into, the payment is refunded or applied towards rent payable under the lease; or
  - (b) from receiving from the lessee payment under a contract with the lessee for carrying out work on the premises before the lessee goes into occupation; or
  - (c) from requiring payment of preparatory costs as permitted by this Act; or
  - (d) from receiving payment of rent in advance; or
  - (e) from securing performance of the lessee's obligations under the lease by requiring a security bond or a guarantee from the lessee or another person (eg a guarantee by the directors of a lessee company guaranteeing performance of the company's obligations under the lease); or
  - (f) from seeking and accepting payment for goodwill of a business that has been conducted by the lessor; or
  - (g) from seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the lessor to the lessee in connection with the granting of the lease; or
  - (h) from seeking and accepting payment for the grant of a franchise in connection with the granting of the lease; or
  - (i) from seeking and accepting payment of an amount of a prescribed class.

## **16—Lease documentation**

A retail shop lease is taken to include provision to the following effect:

- (a) if the lease is not to be registered, the lessor must provide the lessee with an executed copy of the stamped lease within one month after the lease is returned to the lessor or the lessor's lawyer or agent following payment of stamp duty on the lease;
- (b) if the lease is to be registered, the lessor must lodge the lease for registration within one month after the lease is returned to the lessor or the lessor's lawyer or agent following payment of stamp duty on the lease and the lessor must provide the lessee with an executed copy of the stamped and registered lease within one month after the lease is returned to the lessor or the lessor's lawyer or agent following registration of the lease.

## **18—Warranty of fitness for purpose**

- (1) If the lessor under a retail shop lease had, before entering into the lease, notice from the lessee that the premises were required for carrying on a particular business, the lease is taken to include a warranty that the premises will, for the duration of the lease, be structurally suitable for the purpose.
- (2) However, the warranty is excluded if the lessor gives notice of the exclusion, in the manner and form required by regulation, before execution of the retail shop lease by the lessee.
- (3) An assignee or sub-lessee may sue on the warranty if the assignment or sublease is taken for the purpose of carrying on a business of the same kind.
- (4) In proceedings for breach of the warranty, it is a defence for the lessor to prove—
  - (a) the premises were structurally suitable for the purpose when the retail shop lease was entered into; and
  - (b) any change in the structural suitability of the premises is not attributable to the lessor.

## **Part 4—Security**

### **19—Security bond**

- (1) A person must not—
  - (a) require more than one security bond for the same retail shop lease; or
  - (b) require the payment of an amount by way of security under a security bond if the total amount paid by way of security exceeds four weeks' rent under the lease.

Maximum penalty: \$1 000.

The maximum amount of the security bond is to be calculated by reference to the rent payable during the first six months of the lease (expressed as a weekly rent) but if a lease provides rent concessions, such as a rent-free period or a period of rent at concessional rates, the concession will be disregarded.

- (2) However, if the rent payable under a retail shop lease increases, and at least two years have elapsed since the security under a security bond was given or last increased, the lessor may by written notice to the lessee require the lessee to increase the security by a specified additional amount but not so that the total amount of the security exceeds four weeks' rent under the lease.
- (3) A notice requiring an increase in the amount of the security must fix the date by which the additional amount must be paid to the lessor and the date so fixed must be at least 60 days from when the notice is given.
- (4) A requirement to increase the security has effect as if it were a term of the lease.
- (5) A person who receives an amount by way of security must—
  - (a) give, within seven days of the payment, the person who has made the payment a receipt stating the date payment was received, the name of the person from whom the payment was received, the amount paid, and the address of the premises to which the payment relates; and
  - (b) pay the amount of the security to the Commissioner—
    - (i) if the person is a registered agent—within 28 days of the date of receipt;
    - (ii) in any other case—within seven days of the date of the receipt.

Maximum penalty: \$1 000.

## 20—Repayment of security

- (1) An application may be made to the Commissioner for—
  - (a) payment of the whole amount of the security either to the lessor or the lessee; or
  - (b) payment of a specified amount of the security to the lessor and the balance to the lessee.
- (2) The application—
  - (a) must be in a form approved by the Commissioner; and
  - (b) may be made jointly by the lessor and the lessee or by either the lessor or the lessee.
- (3) If the application is undisputed, the Commissioner must pay out the amount of the bond as specified in the application.

An application is *undisputed* if it is a joint application by the lessor and the lessee; or an application by the lessor that the whole of the amount of the security be paid to the lessee; or an application by the lessee that the whole of the amount of the security be paid to the lessor. An application that does not fall into any of those categories, is *liable to be disputed*.
- (4) If an application is liable to be disputed, the Commissioner must give the respondent written notice of the application (in a form the Commissioner thinks appropriate) and inform the respondent that, if the respondent wants to dispute the application, a written notice of dispute must be lodged with the Commissioner within seven days after service of the notice on the respondent.

If the application was made by the lessor, the lessee is the respondent; if the application was made by the lessee, the lessor is the respondent.

- (5) If the respondent does not give the Commissioner written notice of dispute within seven days after the date of the Commissioner's notice (ie the notice under subsection (4)), the Commissioner may pay out the amount of the security as proposed in the application.
- (6) If the Commissioner receives a written notice of dispute before the amount of the security bond is paid out under subsection (5), the Commissioner must refer the dispute to the Magistrates Court for determination.
- (7) A payment under this section will be made from the Fund.

## **Part 4A—Term of lease and renewal**

### **Division 1—Preliminary**

#### **20A—Objects**

- (1) The Parliament recognises that conflicts sometimes arise between a lessor's expectation to be able to deal with leased premises subject only to the terms of the lease and a lessee's expectation of reasonable security of tenure.
- (2) The objects of this Part are to achieve an appropriate balance between reasonable but conflicting expectations and to ensure as far as practicable fair dealing between lessor and lessee in relation to the renewal or extension of a retail shop lease.

### **Division 2—Initial term of lease**

#### **20B—Minimum 5 year term**

- (1) The term for which a retail shop lease is entered into must be at least five years.

The term of a retail shop lease is worked out under this section on the assumption that any right or option of renewal or extension under the lease or a collateral agreement will in fact be exercised. However, a right or option of renewal or extension will not be taken into account if it is given after the lease is entered into.

- (2) A lease is not invalidated by contravention of this section but the term of the lease is extended to bring the term (or aggregate term) to five years.

#### **Example—**

If a lease is entered into for a term of three years, its term is extended by two years to five years. If a lease is entered into for a term of two years with an option for a further one year after that initial two years, the term of the lease is extended to four years (with the option for a further one year after that initial four years).

- (3) This section does not apply to a lease if—
  - (a) the lease is a short-term lease (ie a lease entered into for a fixed term of 6 months or less); or
  - (b) the lease arises when the lessee holds over after the termination of an earlier lease with the consent of the lessor and the period of holding over does not exceed 6 months; or

- (c) the lease contains a certified exclusionary clause; or
- (d) the lessee has been in possession of the retail shop premises for at least 5 years; or
- (e) in the case of a retail shop lease that is a sublease—the term of the retail shop lease is as long as the term of the head lease allows; or
- (f) the lease is of a class excluded by regulation from the ambit of this Division.

### **Division 3—Renewal of shopping centre leases**

#### **Subdivision 1—Application of this Division**

##### **20C—Application of Division**

- (1) This Division applies in relation to a retail shop lease of premises in a retail shopping centre entered into after the commencement of this Division.
- (2) However, this Division does not apply if—
  - (a) the lease is a short term lease (ie a lease entered into for a fixed term of 6 months or less); or
  - (b) the lease contains a certified exclusionary clause; or
  - (c) in the case of a retail shop lease that is a sublease—the term of the retail shop lease is as long as the term of the head lease allows; or
  - (d) the lease is of a class excluded by regulation from the ambit of this Division.

#### **Subdivision 2—Rules of conduct at end of term**

##### **20D—Preference to be accorded to existing lessee**

- (1) If a lessor of premises in a retail shopping centre proposes to re-let the premises, and an existing lessee wants a renewal or extension of the term, the lessor must give preference to the existing lessee over other possible lessees of the premises.
- (2) The lessor is to presume that the existing lessee wants a renewal or extension of the term unless the lessee has notified the lessor in writing within 12 months before the end of the term that the lessee does not want a renewal or extension.
- (3) However, the lessor is not obliged to prefer an existing lessee if—
  - (a) the lessor reasonably wants to change the tenancy mix in the retail shopping centre; or
  - (b) the existing lessee has been guilty of a substantial breach or persistent breaches of the lease; or
  - (c) the lessor requires vacant possession of the premises for the purposes of demolition or substantial repairs or renovation; or
  - (d) the lessor—
    - (i) does not propose to re-let the premises within a period (the *relevant period*) of at least 6 months from the end of the term; and

- (ii) requires vacant possession of the premises for the lessor's own purposes during the relevant period (but not for the purpose of carrying on a business of the same kind as the business carried on by the lessee); or
- (e) the renewal or extension of the lease would substantially disadvantage the lessor; or
- (f) the lessee's right of preference is, in the circumstances of the case, excluded by regulation.

### **20E—Implementation of preferential right**

- (1) If an existing lessee of premises in a retail shopping centre has a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term, begin negotiations with the existing lessee for a renewal or extension of the lease.
- (2) In particular, before agreeing to enter into a lease with another person, the lessor must—
  - (a) make a written offer to renew or extend the existing lease on terms and conditions no less favourable to the lessee than those of the proposed new lease; and
  - (b) provide the existing lessee with a copy of the lease or proposed lease (as renewed or extended) and the disclosure statement required in relation to it.
- (3) When a lessor offers to renew or extend a retail shop lease under this section—
  - (a) the offer remains open for a reasonable period (at least 10 days not including any Saturday, Sunday or other public holiday) after it is given or until its earlier acceptance; and
  - (b) the lessee must notify the lessor in writing within the time stated in the offer whether the lessee accepts the offer; and
  - (c) if notice is not given within that period, the offer lapses.
- (4) The negotiations are to continue until—
  - (a) the lessee rejects an offer under this section (or the offer lapses); or
  - (b) the lessee indicates in writing that the lessee does not want to continue negotiations for a renewal or extension of the lease.
- (5) The negotiations are to be conducted in good faith.

### **20F—Notice of absence of right of preference**

- (1) If a lessee of a retail shop in a retail shopping centre does not have a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term of a lease, by written notice—
  - (a) notify the lessee of that fact; and
  - (b) state why there is in the circumstances of the case no right of preference<sup>1</sup>.
- (2) If the term of the lease is for 12 months or less, the periods referred to in subsection (1) are to be reduced by one-half.



**Note—**

- 1 See section 20D(3).

**20G—Consequences of failing to begin negotiations or give notice**

- (1) If the lessor fails to negotiate or give a notification to the lessee as required by this Subdivision and the lessee by notice in writing to the lessor given before the end of the term of the lease requests an extension of the lease under this section, the term of the lease is extended until the end of six months after the lessor begins the required negotiations or gives the required notice.
- (2) During an extension of the lease under subsection (1), the lessee may terminate the lease by giving not less than one month's notice of the termination in writing to the lessor.
- (3) If the term of the lease is for 12 months or less, the period referred to in subsection (1) is to be reduced by one-half.

**Subdivision 3—Remedies for non-compliance with rules****20H—Fair dealing between lessor and lessee in regard to renewal of lease**

- (1) If a lessor fails, in any respect, to comply with the rules prescribed in Subdivision 2 and the lessee has, in the circumstances of the case, been prejudiced by the failure, the lessee—
  - (a) may lodge a notice of dispute with the Commissioner setting out the lessee's grounds of complaint and applying for mediation of the dispute; or
  - (b) may apply to the Magistrates Court for orders resolving the dispute.
- (2) If a notice of dispute is lodged with the Commissioner under subsection (1)(a)—
  - (a) the Commissioner (or a mediator appointed by the Commissioner) will attempt to resolve the dispute by conciliation; and
  - (b) if the dispute is not resolved by conciliation, the Commissioner must, on application by either party, refer the dispute to the Magistrates Court.
- (3) On an application or reference under this section, the Court may make any order it considers appropriate to resolve the dispute.
- (4) In particular, the Court may—
  - (a) order the lessor to renew or extend the lease, or to enter into a new lease with the lessee, on terms and conditions approved by the Court (but not to the prejudice of the rights of a third party who has in good faith acquired an interest in the premises); or
  - (b) order the lessor to pay compensation (not exceeding 6 months' rent under the lease) to the lessee.
- (5) A fee prescribed by regulation is payable on lodging of a notice or an application under this section.

## **Division 4—Other cases**

### **20I—Application of this Division**

This Division applies to a retail shop lease other than one—

- (a) to which Division 3 applies; or
- (b) in relation to which a right or option to renew or extend the lease exists.

### **20J—Notice to lessee of lessor's intentions at end of lease**

- (1) Not less than 6 months, and not more than 12 months, before the end of the term of a lease, the lessor must by written notice to the lessee either—
  - (a) offer the lessee a renewal or extension of the lease on terms and conditions specified in the notice; or
  - (b) inform the lessee that the lessor does not propose to offer a renewal or extension of the lease.
- (2) A notice under subsection (1)(b) may include other information about the lessor's intentions (for example, that the lessor intends to allow the lessee to remain in possession of the shop as a periodic tenant under a provision of the lease for holding over, or as a tenant at will).
- (3) An offer under subsection (1) is not capable of revocation for one month after it is made.
- (4) If the lessor fails to give a notification to the lessee as required by this section and the lessee by notice in writing to the lessor given before the end of the term of the lease requests an extension of the lease under this section, the term of the lease is extended until the end of six months after the lessor gives the required notice.
- (5) During an extension of the lease under subsection (4), the lessee may terminate the lease by giving not less than one month's notice of the termination in writing to the lessor.
- (6) If the term of a retail shop lease is 12 months or less, this section applies to the lease as if the periods of 12 months and 6 months referred to in the above provisions were reduced by one-half.

## **Division 5—General provisions**

### **20K—Certified exclusionary clause**

- (1) Subject to this section, the rights conferred by this Part cannot be excluded or modified by contract.
- (2) However, the statutory rights of security of tenure may be excluded by a certified exclusionary clause.

- (3) A *certified exclusionary clause* is a provision of a retail shop lease in respect of which a certificate signed by a lawyer who is not acting for the lessor is endorsed on the lease to the effect that—
- (a) the lawyer has, at the request of the prospective lessee, explained the effect of the provision and how this Part would apply in relation to the lease if the lease did not include that provision; and
  - (b) the prospective lessee gave the lawyer apparently credible assurances that the prospective lessee was not acting under coercion or undue influence in requesting or consenting to the inclusion of the provision in the lease.

### **20L—Premium for renewal or extension prohibited**

- (1) A lessee cannot be required to pay a premium for the renewal or extension of a retail shop lease.
- (2) If a lessor or a person acting on behalf of a lessor seeks or accepts a premium for the renewal or extension of a retail shop lease—
  - (a) the lessor is guilty of an offence and liable to a penalty not exceeding \$10 000; and
  - (b) the lessee may recover the amount of the payment as a debt (whether or not the lessor is convicted of the offence).
- (3) This section does not prevent a lessor from—
  - (a) requiring payment from the lessee of a reasonable sum for legal or other expenses incurred in connection with the renewal or extension of a retail shop lease; or
  - (b) receiving payment of rent in advance; or
  - (c) requiring reasonable security from the lessee or another person to secure performance of the lessee's obligations under the renewed or extended lease; or
  - (d) seeking or accepting payment for the grant of a franchise in connection with the renewal or extension of the lease.

### **20M—Unlawful threats**

A lessor or an agent acting for a lessor must not make threats to dissuade a lessee from—

- (a) exercising a right or option to renew or extend a retail shop lease; or
- (b) exercising rights under this Part.

Maximum penalty: \$10 000.

### **20N—Exclusion of legal consequences for which express provision is not made**

Except as expressly provided in this Part, there is no civil remedy for non-compliance with this Part.

## Part 5—Rent and outgoings

### 21—Payment of rent when lessor's fitout not completed

- (1) This section applies to a retail shop lease if—
  - (a) the liability of the lessee to pay rent under the lease commences on the lessee entering into possession of the retail shop (whether or not the lessee is required to enter into possession by a specified date); and
  - (b) the lessor has fitout obligations under the lease.

The lessor has fitout obligations under the lease if the lessor is required to provide finishes, fixtures, fittings, equipment or services before the lessee enters into possession of the shop.

- (2) A retail shop lease to which this section applies is taken to provide that—
  - (a) the lessee is not liable to pay rent, or any other amount payable under the lease by the lessee (such as an amount payable in respect of outgoings), in respect of any period before the lessor has substantially complied with the lessor's fitout obligations; and
  - (b) the lessor is not entitled to deny the lessee possession of the retail shop merely because the lessor has not complied with the lessor's fitout obligations under the lease (but this paragraph does not prevent the lessor from denying the lessee possession of unsafe premises on the ground that they are unsafe).

### 22—Restrictions on adjustment of base rent

- (1) In this section—

**base rent** means rent, or that component of rent, that comprises a specified amount (whether or not there is provision for the amount to change).

**Note—**

Turnover rent (rent determined by reference to the lessee's turnover) is not base rent because turnover rent is not a specified amount of money (it varies according to the lessee's turnover).

- (2) A retail shop lease must not provide for a change to base rent less than 12 months after the lease is entered into and must not provide for a change to that rent less than 12 months after any previous change to that rent, but this subsection does not apply to a change to base rent by a specified amount or specified percentage.

For example, subsection (2) prevents a lease providing for an increase to current market rent more than once in 12 months. It does not prevent a lease providing for the rent to increase by \$100 every six months. Nor does it prevent a lease providing for the rent to be increased to current market rent after 12 months and then to be increased by two per cent every six months after that.

- (3) A provision of a retail shop lease is void to the extent that it—
  - (a) reserves or has the effect of reserving to one party a discretion to decide which of two or more methods of calculating a change to base rent is to apply on a particular occasion; or

- (b) provides for a method of calculating a change to the base rent but reserves or has the effect of reserving to one party a discretion to decide whether or not the base rent is to be changed in accordance with that method on a particular occasion; or
  - (c) provides for base rent to change on a particular occasion in accordance with whichever of two or more methods of calculating the change would result in the higher or highest rent.
- (4) If a retail shop lease provides for a change to base rent in a way that may result in a decrease of rent<sup>1</sup>, a provision of the lease is void to the extent it prevents or enables the lessor or any other person to prevent the decrease.

**Example—**

- 1 A provision for the rent to change to current market rent.

### **23—Reviews to current market rent**

- (1) A retail shop lease that provides for rent to be changed to current market rent is taken to include provision to the following effect:
- (a) the current market rent of the retail shop is the rent that, having regard to the terms and conditions of the lease and other relevant matters, would be reasonably expected for the shop if it were unoccupied and offered for renting for the use to which the shop may be put under the lease;
  - (b) the value of goodwill created by the lessee's occupation and the value of the lessee's fixtures and fittings on the retail shop premises are to be ignored for the purposes of the assessment of current market rent;
  - (c) if the lessor and the lessee do not agree, the amount of the rent is to be determined by valuation carried out by a person appointed by agreement between the parties to the lease or, failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Valuers and Land Economists (SA Division) Inc.;
  - (d) if a valuation is made to determine the rent, the valuer must give detailed reasons for the determination and must specify the matters (including, if relevant, incentives and concessions) taken into account in making the determination;
  - (e) the parties to the lease are liable for the costs of a valuation under this section in equal shares.
- (2) However, there is no need for a valuation if the parties to the lease agree on the amount of the rent.

### **24—Turnover rent**

- (1) If a retail shop lease provides for the determination of rent or a component of rent by reference to turnover, the lease is taken to include provision to the following effect:
- (a) if the turnover includes amounts realised on sale of items purchased from customers in the ordinary course of business, those amounts are to be reduced by the amount of any losses made on the resale or disposal of those items;

- (b) turnover does not include the amount of deposits and instalments received on account of lay-bys, hire purchase or credit sales, and later refunded to customers;
  - (c) if the proceeds of a transaction have been included as part of turnover but a refund is later made to the customer, the turnover is reduced by the amount of the refund;
  - (d) turnover does not include the amount of service, finance or interest charges payable to a financier in connection with provision of credit to customers (other than commissions on credit or store cards);
  - (e) turnover does not include the price of merchandise exchanged between shops of the lessee if the exchange is made solely for the convenient operation of the business of the lessee and not for the purpose of concluding a sale made at or from the shop to which the lease relates;
  - (f) turnover does not include the price of merchandise returns to shippers, wholesalers or manufacturers;
  - (g) turnover does not include the proceeds of sale of the lessee's fixtures and fittings after their use in the conduct of business at or from the retail shop to which the lease relates;
  - (h) turnover does not include the amount of discounts allowed to customers in the normal course of business;
  - (i) turnover does not include the amount of uncollected credit accounts that are written off;
  - (j) turnover does not include the net amount paid or payable by the lessee on account of any purchase tax, receipt tax, or other similar tax imposed at the point of retail sale or hire of goods or services;
  - (k) turnover does not include the amount of delivery charges;
  - (l) turnover does not include the amount received from the sale of lottery tickets and similar tickets (other than commission on those sales);
  - (m) turnover does not include an amount of a prescribed class.
- (2) The lease is taken to provide for underpayments or overpayments of rent (resulting from actual turnover differing from projected or presumed turnover) to be adjusted within one month after the lessee requests the lessor in writing for such an adjustment and provides the lessor with information the lessor reasonably requires to make the adjustment.
- (3) The lessee may make a request for such an adjustment only once in the first 12 months of the lease term and thereafter only at intervals of not less than 12 months following the first request for an adjustment under the lease.
- (4) Subsection (3) does not prevent the lease providing for, or the parties otherwise agreeing to, more frequent adjustments than are provided for by this section.
- (5) A lessor must not require a lessee to provide to the lessor information about the lessee's turnover unless the retail shop lease provides for the determination of rent, a component of rent or outgoings by reference to turnover.

Maximum penalty: \$1 000.

- (6) For the purposes of this section—

*turnover* includes gross takings, gross receipts, gross income and similar concepts.

## 26—Recovery of outgoings from lessee

- (1) The lessee under a retail shop lease is not liable to pay an amount to the lessor in respect of outgoings except in accordance with provisions of the lease that specify—
- (a) the outgoings that are to be regarded as recoverable; and
  - (b) how the amount of the outgoings will be determined and how they will be apportioned to the lessee; and
  - (c) how the outgoings, or a part of them, may be recovered by the lessor from the lessee.
- (2) In this Part, the expression *outgoings to which the lessee contributes* refers to outgoings in respect of which the lessee is liable under the lease to make a payment to the lessor.
- (3) Costs associated with the advertising or promotion of a retail shop or retail shopping centre, or of a business carried on there, are not outgoings for the purposes of this section.

## 29—Sinking fund for major repairs and maintenance

If a retail shop lease provides for the establishment of a sinking fund to fund provision for major items of repair or maintenance, the lease is taken to include provision to the following effect:

- (a) an amount paid by the lessee towards the lessor's outgoings on account of those major items of repair or maintenance is to be paid into the sinking fund;
- (b) so much of the balance standing to the credit of the sinking fund as remains unexpended from time to time for a purpose for which the sinking fund was established is to be held by the lessor in an interest bearing account;
- (c) amounts paid by the lessee for credit of the sinking fund, and the net interest earned by the lessor on the sinking fund, must not be applied by the lessor for a purpose other than payment of outgoings for which the sinking fund was established;
- (d) the lessor is liable to contribute to the sinking fund any deficiency attributable to a failure by the lessor or a predecessor in title of the lessor to comply with paragraph (c).

### Note—

The effect of paragraph (d) will be that a purchaser of the shop from the lessor will have to ensure that the sinking fund has been properly administered and maintained by the previous lessor because the incoming lessor will be liable for any shortfall.

## 30—Land tax not to be recovered from lessee

- (1) A retail shop lease cannot require the lessee to pay land tax or to reimburse the lessor for the payment of land tax.
- (2) However, the lessor's liability for land tax in respect of the premises may be taken into account in the assessment of rent.

- (3) This section does not apply to a retail shop lease entered into before a date fixed by regulation for the purposes of this section.

### **31—Estimates and explanations of outgoings to be provided by lessor**

- (1) A retail shop lease is taken to include provision to the following effect:
- (a) the lessor must give the lessee a written estimate of the outgoings to which the lessee contributes under the lease, itemising those outgoings under the item descriptions used in the list of outgoings in the form of disclosure statement set out in the Schedule;
  - (b) the estimate of outgoings must be given to the lessee in respect of each accounting period of the lessor during the term of the lease and must be given before the lease is entered into and thereafter during the term of the lease at least one month before the commencement of the accounting period concerned.
- (2) A retail shop lease is taken to include provision requiring the lessor, at the request of a lessee, to give the lessee information and explanations that the lessee may reasonably require about expenditure on outgoings to which the lessee is required to contribute and the basis on which the lessee's contribution to the outgoings is determined.

### **32—Lessor to provide auditor's report on outgoings**

A retail shop lease is taken to include provision to the following effect:

- (a) the lessor must, within three months after the end of each accounting period, give the lessee a written report containing a statement of all expenditure by the lessor in the accounting period towards which the lessee is required to contribute in a form that facilitates comparison with the relevant estimate;
- (b) the report is to be prepared by a registered company auditor (within the meaning of the *Corporations Law*) and is to be prepared in accordance with accounting standards (within the meaning of the *Corporations Law*);
- (c) the report is to include a statement by the person who prepared the report whether or not the amounts paid by the lessee in respect of outgoings were properly payable by the lessee and whether or not the total amount of outgoings in respect of which the lessee contributed (that is, the estimated total expenditure by the lessor on outgoings) exceeded the total amount actually expended by the lessor in respect of those outgoings during the period concerned;
- (d) the report may be a composite report (that is, it may relate to more than one lessee) so long as each lessee to which it relates is able to determine from the report whether or not the amounts paid by the lessee in respect of outgoings were properly payable by the lessee;
- (e) the report need not be prepared by a registered company auditor, and need not comply with paragraphs (c) and (d), if it does not relate to outgoings other than water and sewerage rates and charges, local government rates and charges, and insurance so long as the report is accompanied by copies of receipts for all expenditure referred to in paragraph (a).



### 33—Adjustment of contributions to outgoings based on actual expenditure properly and reasonably incurred

A retail shop lease is taken to include provision to the following effect:

- (a) within three months after the end of each accounting period, there is to be an adjustment between the lessor and the lessee to take account of any under-payment or over-payment by the lessee in respect of those outgoings;
- (b) the adjustment is to be calculated on the basis of the difference between the total amount of outgoings in respect of which the lessee contributed (that is, the estimated total expenditure by the lessor on outgoings during the accounting period) and the total amount actually expended by the lessor in respect of those outgoings during that period as shown in the auditor's report, but taking into account only expenditure properly and reasonably incurred by the lessor in payment of those outgoings;
- (c) contribution by the lessee towards, and expenditure by the lessor in respect of, repairs and maintenance is not to be taken into account for the purposes of the adjustment to the extent that the contribution is, and the expenditure is in respect of, contributions required to be paid into a sinking fund as referred to in section 29.

### 34—Non-specific outgoings contribution limited by ratio of lettable area

- (1) A lessee under a retail shop lease in a retail shopping centre is not liable to contribute towards a non-specific outgoing of the lessor (that is, an outgoing not specifically referable to any particular shop in the retail shopping centre) unless the shop is one of the shops to which the outgoing is referable, and is not liable to contribute an amount in excess of an amount calculated by multiplying the relevant amount of that outgoing by the ratio of the lettable area of the shop to the total of the lettable areas of all the retail shops in the shopping centre to which the outgoing is referable.
- (2) In this section—

***excluded premises*** means premises in a retail shopping centre (such as office towers and entertainment annexes) that are leased or available for lease but are not retail shops;

***referable***—an outgoing is **referable** to premises if the premises enjoy or share the benefit resulting from the outgoing;

***relevant amount*** of an outgoing means—

- (a) if the outgoing is wholly referable to retail shops—the total amount of that outgoing;
- (b) if the outgoing is partly referable to retail shops and partly referable to excluded premises—a proportion of the outgoing equal to the proportion that the total lettable area of the retail shops in the retail shopping centre bears to the total lettable area of retail shops and excluded premises.

### **35—Determination of current market rent under options to renew**

- (1) A retail shop lease that provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect:
  - (a) the current market rent of the retail shop is the rent that, having regard to the terms and conditions of the lease and other relevant matters, would be reasonably expected to be paid for the shop if it were unoccupied and offered for renting for the use to which the shop may be put under the lease;
  - (b) the value of goodwill created by the lessee's occupation and the value of the lessee's fixtures and fittings on the retail shop premises are to be ignored for the purposes of the assessment of current market rent;
  - (c) if the lessor and the lessee do not agree as to what the actual amount of that rent is to be, the amount of the rent is to be determined by valuation carried out by a person appointed by agreement between the parties to the lease or, failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Valuers and Land Economists (SA Division) Inc.;
  - (d) if a valuation is made to determine the rent, the valuer must give detailed reasons for the determination and must specify the matters (including, if relevant, incentives and concessions) taken into account in making the determination;
  - (e) the parties to the lease are liable for the costs of a valuation under this section in equal shares.
- (2) There is no need for a valuation if the parties agree on the amount of the rent.

### **36—Opportunity for lessee to have current market rent determined early**

- (1) A retail shop lease that provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect:
  - (a) the lessee is entitled to request a determination of the current market rent within the period that begins six months before and ends two months before the last day on which the option may be exercised under the lease, but may not make such a request if the lessor and the lessee have already agreed as to what the actual amount of that rent is to be;
  - (b) the lessee makes a request by giving notice in writing of the request to the lessor;
  - (c) if the lessee makes a request, the amount of the current market rent is to be determined (as at the time of the request) in accordance with the provisions of section 35, and the period within which the lessee must exercise the option is varied so that the last day on which the option may be exercised is 21 days after the determination of rent is made and notified to the lessee in writing or the last day of the term of the lease, whichever is the earlier;
  - (d) the parties agree that the amount of rent determined under paragraph (c) is the current market rent for the purposes of the exercise of the option (even though it may be a determination of the current market rent as at some earlier time);

- (e) the parties to the lease are to pay the costs of the determination of current market rent in equal shares unless the lessee decides not to exercise the option to renew the lease in which case the lessee is liable to reimburse the lessor for the lessor's share of the costs (ie the lessee must bear the costs in their entirety).
- (2) If the term of the lease is 12 months or less, the periods of six months and two months in this section are shortened to three months and 30 days respectively.

## **Part 6—Alterations and other interference with the shop**

### **37—Lessee to be given notice of alterations and refurbishment**

- (1) A retail shop lease is taken to provide that the lessor must not commence to carry out an alteration or refurbishment of the building or retail shopping centre of which the retail shop forms part that is likely to adversely affect the business of the lessee unless—
  - (a) the lessor has notified the lessee in writing of the proposed alteration or refurbishment at least one month before it is commenced; or
  - (b) the alteration or refurbishment is necessitated by an emergency and the lessor has given the lessee the maximum period of notice that is reasonably practicable in the circumstances.
- (2) However, this section does not apply to routine maintenance or repairs.

### **38—Lessee to be compensated for disturbance**

- (1) A retail shop lease is taken to provide that if the lessor—
  - (a) inhibits access of the lessee to the shop in a substantial manner; or
  - (b) takes action that would inhibit or alter, to a substantial extent, the flow of customers to the shop; or
  - (c) unreasonably takes action that causes significant disruption of, or has a significant adverse effect on, trading of the lessee in the shop; or
  - (d) fails to take all reasonable steps to prevent or put a stop to anything attributable to causes within the lessor's control that causes significant disruption of, or which has a significant adverse effect on, trading of the lessee in the shop; or
  - (e) fails to rectify any breakdown of plant or equipment under the lessor's care or maintenance; or
  - (f) in the case of a shop within a retail shopping centre—fails to clean, maintain or repair the retail shopping centre (including common areas),

and the lessor does not rectify the matter as soon as reasonably practicable after being requested in writing by the lessee to do so, the lessor is liable to pay the lessee reasonable compensation for loss or damage (other than nominal damage) suffered by the lessee as a consequence.

- (2) In determining whether a lessor has acted unreasonably for the purposes of subsection (1)(c), due consideration is to be given to whether the lessor has acted in accordance with recognised shopping centre management practices.

- (3) A retail shop lease may include a provision preventing or limiting a claim for compensation under the provisions implied by this section in respect of a particular occurrence if the likelihood of the occurrence was specifically drawn to the attention of the lessee in writing before the lease was entered into.

**Note—**

A disclosure statement is an appropriate means of specifically drawing the attention of the lessee to the likelihood of an occurrence.

- (4) The provisions implied by this section do not apply to any action taken by the lessor—
- (a) as a reasonable response to an emergency situation; or
  - (b) in compliance with a duty imposed by or under an Act or resulting from a requirement imposed by a public or local authority acting under the authority of an Act.

### **39—Demolition**

- (1) If a retail shop lease provides for termination of the lease on the grounds of proposed demolition of the building of which the retail shop forms part, the lease is taken to include provision to the following effect:
- (a) the lease cannot be terminated on that ground unless and until the lessor has provided the lessee with details of the proposed demolition sufficient to indicate a genuine proposal to demolish that building within a reasonably practicable time after the lease is to be terminated;
  - (b) the lease cannot be terminated by the lessor on that ground without at least six months written notice of termination;
  - (c) if notice of termination on that ground is given to the lessee, the lessee may terminate the lease by giving the lessor not less than seven days written notice of termination at any time within six months before the termination date notified by the lessor.
- (2) If the lease is for a term of 12 months or less, the period of six months in subsection (1)(b) and (c) is shortened in each case to three months.
- (3) If a retail shop lease is terminated on such a ground and demolition of the building is not carried out within a reasonably practicable time after the termination date notified by the lessor, the lessor is liable to pay the lessee reasonable compensation for damage suffered by the lessee as a consequence of the early termination of the lease, unless the lessor establishes that at the time notice of termination was given by the lessor there was a genuine proposal to demolish the premises within that time.

### **40—Damaged premises**

- (1) A retail shop lease is taken to provide for the following if the shop or the building of which the shop forms part is damaged—
- (a) the lessee is not liable to pay rent, or any amount payable to the lessor in respect of outgoings or other charges, that is attributable to a period during which the shop cannot be used under the lease or is inaccessible due to that damage;

- (b) if the shop is still useable under the lease but its useability is diminished due to the damage, the lessee's liability for rent and any amount for outgoings attributable to a period during which useability is diminished is reduced in proportion to the reduction in useability caused by the damage;
  - (c) if the lessor notifies the lessee in writing that the lessor considers that the damage is such as to make its repair impracticable or undesirable, the lessor or the lessee may terminate the lease by giving not less than seven days notice in writing to the other and no compensation is payable in respect of that termination;
  - (d) if the lessor fails to repair the damage within a reasonable time after the lessee requests the lessor in writing to do so, the lessee may terminate the lease by giving not less than seven days notice in writing of termination to the lessor;
  - (e) paragraphs (a) to (d) do not affect a right of the lessor to recover damages from the lessee in respect of damage or destruction to which those paragraphs apply.
- (2) However, a lessee is not relieved of the obligation to pay rent if the damage results from the wrongful act or negligence of the lessee or an employee or agent of the lessee unless the lessor is insured against loss of rent under an insurance policy and the lessee contributes to the insurance premium.
  - (3) A retail shop lease must not contain provision the effect of which is to limit a liability of a party to the lease to pay compensation to another party in respect of damage to the shop or the building of which the shop forms part.
  - (4) Nothing in this section prevents the parties to a lease from terminating the lease by agreement if the shop or the building of which it forms part is damaged or destroyed.

#### **41—Employment restriction**

A retail shop lease must not contain a provision that limits or has the effect of limiting the lessee's right to employ persons of the lessee's own choosing, but this section does not prevent the lease containing any one or more of the following provisions:

- (a) a provision specifying minimum standards of behaviour for persons employed in the shop;
- (b) a provision requiring the lessee to comply with the requirements of an industrial award or agreement (such as a construction site agreement) affecting a retail shopping centre in which the shop is situated.

### **Part 7—Assignment and termination**

#### **43—Grounds on which consent to assignment can be withheld**

- (1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):
  - (a) if the proposed assignee proposes to change the use to which the shop is put;  
or

- (b) if the proposed assignee is unlikely to be able to meet the financial obligations of the lessee under the lease; or
  - (c) if the proposed assignee's retailing skills are inferior to those of the assignor; or
  - (d) if the lessee has not complied with procedural requirements for obtaining the lessor's consent<sup>1</sup>.
- (2) If the lessor withholds consent to the assignment of a retail shop lease, the lessor must give the lessee a written statement of the grounds on which consent is withheld.

**Note—**

<sup>1</sup> See section 45.

#### **44—Premium on assignment prohibited**

- (1) A lessor must not seek or accept the payment of a premium in connection with the granting of consent to the assignment of a retail shop lease and a provision of a retail shop lease is void to the extent that it requires the payment of a premium in connection with the granting of consent to the assignment of the lease.
- (2) If a lessor or a person acting on behalf of a lessor contravenes this section—
- (a) the person is guilty of an offence and liable to a penalty not exceeding \$10 000; and
  - (b) the lessee is entitled to recover from the lessor as a debt any payment made or the value of any benefit conferred by the lessee and accepted by or on behalf of the lessor in contravention of this section (whether or not the person is convicted of an offence under paragraph (a)).
- (3) This section does not prevent the lessor from requiring payment of a reasonable sum for legal or other expenses incurred in connection with such a consent (but the lessee is entitled to have those expenses substantiated by the lessor before making such a payment).

**Note—**

The lessor and a proposed assignee may enter into a new lease of the retail shop instead of proceeding with the assignment.

#### **45—Procedure for obtaining consent to assignment**

A retail shop lease is taken to include the following provisions:

- (a) a request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with information the lessor reasonably requires about the use to which the proposed assignee proposes to put the shop and the financial standing and business experience of the proposed assignee;
- (b) before requesting the consent of the lessor to a proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee is aware or could reasonably be expected to be aware);

- (c) for the purpose of enabling the lessee to comply with paragraph (b), the lessee is entitled to request the lessor to provide the lessee with a copy of the disclosure statement concerned and, if the lessor is unable or unwilling to comply with such a request within 14 days after it is made, paragraph (b) does not apply to the lessee;
- (d) the lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if the lessee has complied with paragraphs (a) and (b) and the lessor has not within 42 days after the request was made given notice in writing to the lessee either consenting or withholding consent.

#### 45A—Liability of lessee following assignment of lease

- (1) Subject to subsection (4), notwithstanding the provisions of a retail shop lease or of any other agreement (whether being a lease or agreement made before or after the commencement of this section), if the lessee assigns the retail shop lease, the lessee, and any guarantor of the lessee, will not be subject to any obligations or liabilities under the lease on or after the relevant date.
- (2) Nothing in subsection (1) relieves the lessee, or a guarantor of the lessee, of any obligations or liabilities accrued in respect of the retail shop lease prior to the relevant date.
- (3) In this section—

*relevant date* means—

  - (a) the second anniversary of the date on which the lease was assigned; or
  - (b) the date on which the lease expires; or
  - (c) if the lease is renewed or extended after the assignment, the date on which the renewal or extension commences,

whichever first occurs.
- (4) Subsection (1) does not apply to the assignment of a retail shop lease in respect of a retail shop that is to continue as an ongoing business if—
  - (a) the assignor did not provide a disclosure statement (an *assignor's disclosure statement*) containing the information referred to in subsection (5)—
    - (i) to the proposed assignee, before requesting the consent of the lessor to the proposed assignment of the lease; and
    - (ii) to the lessor, at the time the request for consent to the proposed assignment is made by the lessee; or
  - (b) an assignor's disclosure statement provided to the proposed assignee and the lessor contained information that at the time it was provided was materially false or misleading.

- (5) The assignor's disclosure statement is a written document (in the form prescribed by the regulations) stating—
- (a) whether the assignor has provided the assignee with the lessor's disclosure statement in respect of the lease (together with details of any changes to the information contained in the disclosure statement since the statement was given); and
  - (b) whether there are any outstanding notices in respect of the lease and, if so, the details of any such notices; and
  - (c) whether there are any outstanding notices from any authority in respect of the retail shop and, if so, the details of any such notices; and
  - (d) whether there are any encumbrances on the lease and, if so, the details of any such encumbrances; and
  - (e) whether there are any encumbrances on, or whether any third party has an interest in, any fixtures and fittings within the retail shop and, if so, the details of any such encumbrances or interest; and
  - (f) whether the lessor has conferred any rent concessions or other benefits on the assignor during the term of the lease and, if so, the details of any such concessions or benefits; and
  - (g) the total (aggregate) annual sales figures in respect of the retail shop for the past three years, or such lesser period as the lease has been in operation; and
  - (h) details of any other information the assignor has provided to the assignee as to the trading performance of the retail shop during the past three years or for such lesser period as the lease has been in operation; and
  - (i) any other matters prescribed by the regulations.

#### **46—Lessor may reserve right to refuse sublease, mortgage**

A retail shop lease may contain a provision that allows the lessor to refuse in the lessor's absolute discretion—

- (a) consent to the grant of a sublease, licence or concession for the whole or a part of the shop; or
- (b) consent to the lessee parting with possession of the whole or a part of the shop; or
- (c) consent to the lessee mortgaging or otherwise charging or encumbering the lessee's interest in the lease.

## **Part 8—Additional requirements for retail shopping centres**

### **50—Part applies only to retail shopping centres**

This Part applies only to retail shop leases of shops in retail shopping centres and (in respect of those leases) applies in addition to the other provisions of this Act.



## 51—Confidentiality of turnover information

If a retail shop lease requires the lessee to provide information to the lessor about the turnover of the business of the lessee, the lessor must not divulge or communicate information provided by the lessee except—

- (a) with the consent of the lessee; or
- (b) in a document giving aggregate turnover information about a retail shopping centre in a manner that does not disclose information about the turnover of an individual lessee's business; or
- (c) to a court or arbitrator, or for the purposes of a mediation or valuation for the purposes of this Act or the lease; or
- (d) in compliance with a requirement made by or under an Act; or
- (e) to the lessor's professional advisers (such as legal or financial advisers), or to the proper officer of a financial institution for the purpose in good faith of enabling the lessor to obtain financial accommodation; or
- (f) in good faith to a prospective purchaser of the retail shop or the building of which it forms part.

Maximum penalty: \$10 000.

## 52—Statistical information to be made available to lessee

If a retail shop lease requires the lessee to pay an amount in respect of outgoings on account of expenditure incurred in obtaining statistical information, the lease is taken to include provision that the lessor must make information so obtained by the lessor available to the lessee.

### Example—

The cost of a count undertaken at the request of the lessor to assess the extent of vehicular or pedestrian traffic.

## 53—Advertising and promotion requirements

- (1) A provision in a retail shop lease is void to the extent that it requires the lessee to undertake advertising or promotion of the lessee's business.
- (2) Subsection (1) does not apply to a provision in a lease that requires a payment to the lessor for advertising and promotion costs incurred or to be incurred by the lessor.

## 54—Marketing plan for advertising and promotion

- (1) If a retail shop lease requires the lessee to pay an amount to the lessor towards advertising and promotion costs, the lease is taken to include provision to the following effect:
  - (a) the lessor must, at least two months before the start of each accounting period of the lessor, make available to the lessee a marketing plan that gives details of the lessor's proposed expenditure on advertising and promotion during that accounting period;
  - (b) if such a payment relates to an opening promotion, the lessor must, at least two months before that opening promotion, make available to the lessee details of the proposed expenditure on that promotion.

- (2) The lessor must consider any proposals for change made by the lessee within one month after the marketing plan is made available to the lessee.

### **55—Lessor to provide auditor's report on advertising and promotion expenditure**

A retail shop lease is taken to include provision to the following effect:

- (a) the lessor must give the lessee a written report that complies with this section and details all expenditure by the lessor in each accounting period of the lessor during the term of a retail shop lease on account of advertising or promotion costs to which the lessee is required to contribute under the lease;
- (b) each report is to be given to the lessee within three months after the end of the accounting period to which it relates;
- (c) the report is to be prepared by a registered company auditor (within the meaning of the *Corporations Law*) and is to be prepared in accordance with accounting standards (within the meaning of the *Corporations Law*).

### **56—Unexpended advertising and promotion contributions to be carried forward**

A retail shop lease is taken to include provision that an amount contributed by a lessee in the shopping centre under a retail shop lease for advertising or promotion costs of the lessor and which is not spent for the purpose for which it was contributed must be carried forward by the lessor, to be applied towards future expenditure on advertising or promotion of the centre.

### **57—Relocation**

If a retail shop lease contains provision that enables the lessee's business to be relocated, the lease is taken to include provision to the following effect:

- (a) the lessor cannot require the relocation of the lessee's business unless and until the lessor has provided the lessee with details of a proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that is to be carried out within a reasonably practicable time after relocation of the lessee's business and that cannot be carried out practicably without vacant possession of the lessee's shop; and
- (b) the lessor cannot require the relocation of the lessee's business unless the lessor has given the lessee at least three months written notice of relocation (a **relocation notice**) and that notice gives details of an alternative shop to be made available to the lessee; and
- (c) the lessee is entitled to be offered a new lease of the alternative shop on the same terms and conditions (excluding rent) as the existing lease except that the term of the new lease is to be for the remainder of the term of the existing lease<sup>1</sup>; and
- (d) if a relocation notice is given, the lessee may terminate the lease within one month after the relocation notice is given by giving written notice of termination to the lessor, in which case the lease is terminated three months after the relocation notice was given unless the parties agree that it is to terminate at some other time; and

- (e) if the lessee does not give a notice of termination under paragraph (d), the lessee is taken to have accepted the offer of a lease unless the parties have agreed to a lease on some other terms; and
- (f) the lessee is entitled to payment by the lessor of the lessee's reasonable costs of the relocation, including legal costs<sup>2</sup>.

**Notes—**

- 1 Paragraph (c) only specifies the minimum entitlements that the lessee can insist on. It does not prevent the lessee from accepting other arrangements offered by the lessor when the details of a relocation are being negotiated.
- 2 This section does not prevent the parties negotiating a new lease for the purpose of relocating the lessee. Paragraph (f) only specifies the minimum entitlements that the lessee can insist on and the parties can come to some other arrangement for the payment or sharing of the lessee's relocation costs when the details of a relocation are being negotiated.

### **58—Termination for inadequate sales prohibited**

A retail shop lease must not contain a provision that permits or otherwise provides for the termination of the lease on the ground that the lessee or the business of the lessee has failed to achieve a particular level of sales or turnover.

### **59—Geographical restrictions**

- (1) A retail shop lease must not contain a provision which has the effect of preventing or restricting the lessee from carrying on business outside the retail shopping centre, either during the term of or after the expiry of the lease.
- (2) This section does not operate to prevent a lease or other agreement from containing a provision that prevents the use of the name of the retail shopping centre in connection with a business carried on outside the shopping centre.

### **60—Associations representing lessees**

- (1) A retail shop lease must not contain a provision that has the effect of preventing or restricting the lessee from joining, forming or taking part in the activities of an association to represent or protect the interests of lessees.
- (2) A lessee is entitled to be accompanied and represented by a member or officer of such an association when conducting negotiations with the lessor but, if the retail shop is in a shopping centre, the member or officer of the association must not be a lessee of another shop in the same shopping centre.

### **61—Trading hours**

- (1) A retail shop lease may only regulate trading hours if—
  - (a) the shop is within an enclosed shopping complex; and
  - (b) the lease does not reduce the trading hours for which the shop is permitted to be open for trade to less than 50 hours per week; and
  - (c) the core trading hours (ie the hours for which the shop is required to be open for business)—
    - (i) do not exceed 54 hours a week and do not include any time on a Sunday; and

- (ii) have been approved in a secret ballot, conducted in accordance with the regulations, by a majority of at least 75% of the votes cast.
- (2) In the ballot, the lessor is entitled to one vote and the lessee of each retail shop affected by the proposal to be decided by the ballot is entitled to one vote in respect of that shop.
- (2a) The lessor or the lessee under a retail shop lease (or an officer of an association referred to in section 60 acting at the request of a lessee) may call a meeting of the persons who are entitled to vote in a ballot to vote on a resolution approving different core trading hours for the purposes of subsection (1)(c).
- (3) A retail shop lease for a shop that is required to be open for business during core trading hours is void to the extent that it requires the lessee to pay, or pay a contribution towards, the costs of operating the shopping complex outside core trading hours when the lessee's shop is not open for trading.
- (4) A lessee may apply to the lessor for exemption from the provisions of the retail shop lease regulating trading hours.
- (5) On receiving a written application for an exemption under subsection (4), the lessor must not unreasonably withhold the exemption (but it may be granted on reasonable conditions).
- (6) A provision in a retail shop lease, or in any determination as to core trading hours under this section, is void to the extent that it requires the lessee to open the shop on any Sunday.

## **62—Special provision for strata and community shopping centres**

- (1) If a retail shop is a strata unit under the *Strata Titles Act 1988*, and the shop is subject to a retail shop lease, this Act applies with necessary modifications (and also any modifications prescribed by regulation) to requirements, limitations and restrictions imposed under the articles of the strata corporation as if they formed part of the lease.
- (2) If a retail shop is a community lot under the *Community Titles Act 1996*, and the shop is subject to a retail shop lease, this Act applies with necessary modifications (and also any modifications prescribed by regulation) to requirements, limitations and restrictions imposed by the scheme description or the by-laws of the scheme as if they formed part of the lease.

## **62A—Casual Mall Licensing Code**

A lessor in respect of a retail shopping centre must comply with the provisions of the Casual Mall Licensing Code set out in the Schedule.

## **Part 9—Dispute resolution**

### **Division 1—Mediation**

## **63—Responsibility of the Commissioner to arrange for mediation of disputes**

The Commissioner is responsible for making arrangements to facilitate the resolution of disputes between parties (or former parties) to retail shop leases.

**64—Mediation of disputes**

- (1) A party (or former party) to a retail shop lease may apply to the Commissioner for mediation of—
  - (a) a dispute arising from, or related to, the lease; or
  - (b) a dispute related to any other matter relevant to the occupation of the premises or to a business conducted at the premises.
- (2) A fee prescribed by regulation is payable on an application under this section.

**65—Stay of proceedings**

- (1) If a dispute between parties (or former parties) to a retail shop lease is the subject of proceedings before a court, the court may refer the dispute to the Commissioner for mediation under this Division.
- (2) The court may stay the proceedings while an attempt is made to settle the dispute by mediation.

**66—Statements made during mediation**

Evidence of admissions or statements made in the course of the mediation of a dispute under this Division is not admissible in evidence before a court.

**Division 2—Intervention****67—Power to intervene**

- (1) The Commissioner may intervene in proceedings before a court concerning a dispute about a retail shop lease or rights or obligations under a retail shop lease.
- (2) If the Commissioner intervenes in proceedings the Commissioner becomes a party to the proceedings and has all the rights (including rights of appeal) of a party to the proceedings.

**Division 3—Jurisdiction of the Magistrates Court****68—Jurisdiction of the Magistrates Court**

- (1) An application for an order under this section may be commenced by application to the Magistrates Court by a party (or former party) to a retail shop lease or a collateral agreement.
- (2) The Magistrates Court may on application under this section, by order—
  - (a) restrain an action in breach of this Act, a retail shop lease or a collateral agreement; or
  - (b) require a person to comply with an obligation under this Act, a retail shop lease or a collateral agreement; or
  - (c) order a person to make a payment (including a payment of compensation) that is payable under this Act, a retail shop lease or a collateral agreement; or
  - (d) order the payment of compensation for loss or damage resulting from a breach of this Act, a retail shop lease or a collateral agreement; or

- (e) relieve a party to a retail shop lease or a collateral agreement from the obligation to comply with a provision of the lease or agreement; or
- (f) reinstate rights under a retail shop lease that have been forfeited or have otherwise terminated; or
- (g) require the payment of rent under a retail shop lease into the Magistrates Court until the lease has been performed or an application for compensation has been determined; or
- (h) require that rent paid into the Magistrates Court be paid out and applied as directed by the Magistrates Court; or
- (i) require a tenant to surrender possession of premises to the lessor; or
- (j) do anything else necessary or desirable to resolve a dispute between the parties to the retail shop lease.

### **69—Substantial monetary claims**

- (1) If a proceeding before the Magistrates Court involves a monetary claim for an amount exceeding \$40 000, the Magistrates Court must on the application of a party to the proceeding refer the proceeding into the District Court.
- (2) If a proceeding is referred to the District Court, the Court has, in addition to the powers that it has apart from this section, the powers that the Magistrates Court has under this Division.

## **Part 10—Retail Leases Fund**

### **70—The Fund**

- (1) The *Retail Shop Leases Fund* is established.
- (2) The Fund is to be kept and administered by the Commissioner.
- (3) The Fund consists of the amounts received by the Commissioner by way of security bonds, and other amounts paid into the Fund under this Act.
- (4) The Fund may be invested as approved by the Minister.
- (5) The Commissioner will make repayments in respect of security bonds from the Fund.

### **71—Application of income**

The income derived from investment of the Fund may be applied, to the extent determined by the Minister—

- (a) towards the costs of the administration of this Act; and
- (b) towards the cost of mediating disputes under this Act; and
- (c) towards the costs of the Magistrates Court in the exercise of its jurisdiction under this Act; and
- (d) for the education of lessors and lessees about their statutory and contractual rights and obligations; and
- (e) towards programmes designed to improve the management of business in this State; and

- (f) for the benefit of lessors and lessees in other ways approved by the Minister.

## **72—Accounts and audit**

- (1) The Commissioner must keep proper accounts of the receipts and payments from the Fund.
- (2) The Auditor-General may at any time, and must at least once in each year, audit the accounts of the Fund.

## **Part 11—Retail Shop Leases Advisory Committee**

### **73—Advisory Committee**

- (1) The *Retail Shop Leases Advisory Committee* is established.
- (2) The Committee will be constituted in the manner prescribed by the regulations.
- (3) The regulations may also provide for—
  - (a) the procedures of the Committee; and
  - (b) other matters relevant to the functions or operation of the Committee.

### **74—Functions of Advisory Committee**

The functions of the Retail Shop Leases Advisory Committee are to—

- (a) keep the administration of this Act under review; and
- (b) make reports to the Minister on subjects that, in the Committee's opinion, justify a report, or on which the Minister requests a report.

## **Part 12—Miscellaneous**

### **75—Vexatious acts**

A party to a retail shop lease must not, in connection with the exercise of a right or power under this Act or the lease, engage in conduct that is, in all the circumstances, vexatious.

Maximum penalty: \$5 000.

### **76—Abandoned goods**

- (1) If a retail shop lease terminates or is terminated, and goods are left on the premises that were subject to the lease, then—
  - (a) the lessor may, when at least two days have passed since the lessor took possession of the premises, remove, and destroy or dispose of, goods—
    - (i) if they are perishable foodstuffs; or
    - (ii) if their value is less than a fair estimate of the cost of their removal, storage and sale; but
  - (b) if the goods are not liable to destruction or disposal under paragraph (a), the lessor must store the goods in a safe place and manner for at least 60 days.

- (2) The lessor must, within seven days after storing goods or having goods stored under this section—
  - (a) give notice of the storage of the goods to—
    - (i) if the lessee has left a forwarding address—the lessee; and
    - (ii) if another person has, to the knowledge of the lessor, an interest in the goods and the person's name and address are known to, or reasonably ascertainable by, the landlord—that person; and
  - (b) publish notice of the storage of the goods in a newspaper circulating generally throughout the State.
- (3) A notice must be in the form prescribed by regulation for the purposes of this section.
- (4) A person who is entitled to possession of goods stored under this section may reclaim the goods by paying to the lessor—
  - (a) the reasonable costs of removing and storing the goods; and
  - (b) the reasonable costs of giving notice under subsection (2)(b); and
  - (c) any other reasonable costs incurred by the lessor as a result of the goods being left on the premises.
- (5) If the goods are not reclaimed within the 60 day period, the lessor must, as soon as practicable after the end of that period, have the goods sold by public auction.
- (6) On the sale of the goods by public auction, the lessor—
  - (a) may retain out of the proceeds of sale—
    - (i) the reasonable costs of removing, storing and selling the goods; and
    - (ii) the reasonable costs of giving notice under subsection (2)(b); and
    - (iii) any other reasonable costs incurred by the lessor as a result of the goods being left on the premises; and
    - (iv) any amounts owed to the lessor under the lease; and
  - (b) pay the balance (if any) to the owner, or if the identity and address of the owner are not known to, or reasonably ascertainable by, the lessor, to the Commissioner for the credit of the Fund.
- (7) If goods are sold by public auction under this section, the purchaser acquires a good title to the goods in defeasance of—
  - (a) the lessee's interest in the goods; and
  - (b) the interests of others (apart from the lessee) unless the purchaser has actual notice of the interest before purchasing the goods.
- (8) If a dispute arises between a lessor and lessee about the exercise of powers conferred by this section, the Magistrates Court may, on application by either party to the dispute, make orders resolving the matters in dispute.



### **77—Exemptions**

- (1) The Minister may, on application by an interested person, grant an exemption from all or any of the provisions of this Act in relation to—
  - (a) a particular retail shop lease or proposed retail shop lease; or
  - (b) retail shop leases of a particular class; or
  - (c) a particular retail shop or retail shops of a particular class.
- (2) The Magistrates Court may, on application by an interested person, grant an exemption from all or any of the provisions of this Act in relation to—
  - (a) a particular retail shop lease or proposed retail shop lease; or
  - (b) a particular retail shop or proposed retail shop.
- (3) An exemption may be granted on conditions the exempting authority considers appropriate.
- (4) A person must not contravene a condition of an exemption.  
Maximum penalty: \$500.

### **78—Annual reports**

- (1) The Commissioner for Consumer Affairs must, on or before 31 October in each year, deliver to the Minister an annual report—
  - (a) containing a report on—
    - (i) the administration of this Act during the financial year ending on 30 June in that year; and
    - (ii) the administration of the Fund during the financial year ending on 30 June in that year; and
  - (b) containing a copy of the accounts of the Fund last audited by the Auditor-General.
- (2) The Registrar must, on or before 31 October in each year, deliver to the Minister an annual report on—
  - (a) the work of the Registrar and the Magistrates Court under this Act during the financial year ending on 30 June in that year; and
  - (b) other matters that are in the opinion of the Registrar of sufficient interest to lessors and lessees to be included in the report.
- (3) The Minister must, within 12 sitting days after receiving a report under this section, have copies of the report laid before both Houses of Parliament.

### **79—Time for prosecutions**

- (1) A prosecution for an offence against this Act must be commenced within two years after the date the offence is alleged to have been committed.
- (2) However, the Minister may, in a particular case, extend the period for bringing a prosecution but not so that the prosecution may be commenced more than five years after the date the offence is alleged to have been committed.

- (3) A document apparently signed by the Minister and stating that the Minister allows an extension of the period for commencing a particular prosecution will be accepted, in the absence of proof to the contrary, as proof of the extension of time for commencing the prosecution.

## 80—Regulations

- (1) The Governor may make regulations for the purposes of this Act.
- (2) A regulation may, for example, prescribe codes of practice to be complied with by lessors and lessees.
- (3) A regulation may impose a fine (not exceeding \$2 000) for contravention of a provision of a regulation.

## 81—Amendment of the Landlord and Tenant Act

- (1) Part 4 of the *Landlord and Tenant Act 1936* (the *former legislation*) is repealed.
- (2) However—
  - (a) the former legislation continues to apply, subject to modifications prescribed by regulation, to retail shop leases entered into before the commencement of this Act (including such a lease that is renewed after the commencement of this Act under a right or option of renewal conferred before the commencement of this Act); but
  - (b) if the retail shop lease creates a periodic tenancy, this Act applies to the lease as from the beginning of the first period after the first anniversary of the commencement of this Act as if there were a novation of the lease on that date.
- (3) The regulations made for the purposes of subsection (2)(a) may provide that specified provisions of this Act apply to a retail shop lease entered into before the commencement of this Act.
- (4) The Fund established under the former legislation is dissolved and the money constituting that Fund at the commencement of this Act is incorporated in the Fund established under this Act.
- (5) References in the former legislation to the Fund established under that legislation are to be construed (so far as the relevant provisions give rights or impose obligations on parties to leases) as references to the Fund under this Act.

## Schedule—Casual Mall Licensing Code

### 1—Interpretation

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

*adjacent lessee*, in relation to a casual mall licence area, means a lessee of a retail shop that is in the same retail shopping centre and is situated in front of or immediately adjacent to the casual mall licence area;

*casual mall licence* means an agreement under which a person grants, or agrees to grant, to another person a right to occupy a designated part of a mall area for the purposes of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days;

**casual mall licence area**, in relation to a casual mall licence, means the part of the mall area in respect of which a person is granted a right of occupancy under the casual mall licence;

**casual mall licence plan**—see clause 2(2);

**casual mall licence policy**—see clause 2;

**centre court** means a part of a mall area designated as a centre court by the lessor in a casual mall licence policy in accordance with clause 2;

**common area** does not include parking areas, loading docks, plant rooms, customer service areas, stairways, escalators, travelators, lifts, lift wells, toilets, restrooms, seating areas, food courts, stage areas, entertainment areas, or lifestyle precincts;

**competitor**—see subclause (2);

**external competitor**—see subclause (3);

**internal competitor**—see subclause (4);

**mall area** means a part of the common area of a retail shopping centre accessible to the public that is bordered wholly or partly by the shopfronts of retail shops;

**non-specific outgoings** means outgoings to which section 34 applies;

**sales period** means a period not exceeding four weeks fixed from time to time by the lessor as a period during which the lessor promotes a sales event in the retail shopping centre;

**special event** means a community, cultural, arts, entertainment, recreational, sporting, promotional or other similar event that is to be held in the retail shopping centre over a limited period of time.

- (2) For the purposes of this Schedule—
- (a) in the case of the sale of goods—a person is a **competitor** of another person if more than 50 per cent (on a floor area occupied by display basis) of the goods displayed for sale by the person are of the same general kind as more than 20 per cent (on a floor area occupied by display basis) of the goods displayed for sale by the other person;
  - (b) in the case of the supply of services—a person is a **competitor** of another person if the person competes with the other person to a substantial extent.
- (3) For the purposes of this Schedule, a person granted a casual mall licence is an **external competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee but is not a lessee of another retail shop in the same retail shopping centre.
- (4) For the purposes of this Schedule, a person granted a casual mall licence is an **internal competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee and is a lessee of another retail shop in the same retail shopping centre.

## 2—Casual mall licence policy

- (1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has prepared a document that sets out the lessor's policy in respect of the granting of casual mall licences for the shopping centre (a *casual mall licence policy*).
- (2) The casual mall licence policy must include the following:
  - (a) a floor plan (a *casual mall licence plan*) that clearly shows—
    - (i) the mall areas within the shopping centre in respect of which casual mall licences may be granted, and the dimensions of those areas; and
    - (ii) the part of the mall area within the shopping centre designated as the centre court (if any), and the dimensions of that area;
  - (b) the number of sales periods for the shopping centre in each accounting period;
  - (c) a statement whether the lessor reserves the right to grant casual mall licences otherwise than in accordance with clauses 4, 5 and 6 in respect of special events in the shopping centre.
- (3) The following provisions apply to the designation of an area as a centre court in a casual mall licence policy:
  - (a) only one part of the mall area of the shopping centre may be designated as a centre court at any one time;
  - (b) the area designated as a centre court must not exceed 20 per cent of the total common area of the shopping centre.
- (4) If a lessor amends a casual mall licence policy, the lessor must—
  - (a) give written notice of the amendment to the lessees of the shopping centre and the place and times at which a copy of the amended policy may be inspected; and
  - (b) in the case of a lessee who may reasonably be considered to be affected by the amendment—provide a copy of the amended policy to the lessee; and
  - (c) otherwise provide a copy of the amended policy to a lessee on request.
- (5) An amendment to a casual mall licence policy does not take effect until 30 days after the lessees of the shopping centre have been notified in accordance with subclause (4)(a).

## 3—Provision of information

- (1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has given each person who is a lessee of a retail shop in the shopping centre the following information:
  - (a) a copy of the casual mall licence policy in force in respect of the shopping centre; and
  - (b) a copy of this Schedule; and

- (c) the person nominated by the lessor to deal with complaints about casual mall licences (whether described by name or the title of the person's position) and the person's contact details.
- (2) The information required under subclause (1) must have been given to a person—
  - (a) in the case of a person who has entered into a retail shop lease after the commencement of this Schedule—at the time the disclosure statement for the lease was provided to the person under Part 3; or
  - (b) in any other case—not less than 14 days before the first granting of a casual mall licence in respect of the shopping centre after the commencement of this Schedule.

#### **4—Obligations of lessor relating to casual mall licence policy**

- (1) A lessor must not grant a casual mall licence except in accordance with the casual mall licence policy as in force in respect of the retail shopping centre at the time the licence is granted.
- (2) A lessor must not grant a casual mall licence in respect of an area that is not included in a casual mall licence plan as in force in respect of the retail shopping centre at the time the licence is granted.
- (3) A lessor must not amend a casual mall licence policy except in accordance with this Schedule.

#### **5—Sightlines to shopfront**

- (1) A lessor must ensure that the business conducted by the holder of a casual mall licence in respect of a retail shopping centre does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre.
- (2) Subclause (1) does not apply in relation to a lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that might result in interference of a kind referred to in subclause (1), obtained the written consent of the lessee to the grant of the licence.

#### **6—Competitors**

- (1) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.
- (2) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor of an adjacent lessee unless—
  - (a) the internal competitor is a lessee of a retail shop situated in the same retail precinct as the casual mall licence area, or if the shopping centre is not divided into precincts, in the vicinity of the casual mall licence area; or
  - (b) the casual mall licence area is the area closest to the internal competitor's retail shop that is available for the casual mall licensing at the time the casual mall licence is granted; or
  - (c) the term for which the casual mall licence is granted falls within a sales period fixed by the lessor in respect of the shopping centre, there having been no more than five previous sales periods in the preceding period of twelve months; or

- (d) the casual mall licence area is within the centre court of the shopping centre.
- (3) Subclause (2) does not apply in relation to an adjacent lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that will result in the introduction of an internal competitor of the lessee, obtained the written consent of the lessee to the grant of the licence.
- (4) For the purposes of subclauses (1) and (2), the introduction of a competitor of an adjacent lessee is unreasonable if it has a significant adverse effect on the trading of the adjacent lessee in the adjacent lessee's retail shop.
- (5) Subclause (4) is not to be taken as limiting the circumstances in which the introduction of a competitor of an adjacent lessee might be regarded as being unreasonable.

## 7—Special events

Clauses 4, 5, and 6 do not apply to casual mall licences granted in respect of a special event provided that the lessor—

- (a) reserved the right in the casual mall licence policy to grant casual mall licences otherwise than in accordance with those clauses; and
- (b) gave the lessees of the retail shopping centre not less than 24 hours written notice containing details of the special event and its duration.

## 8—Adjustment of outgoings

The lessor must, before making an adjustment after the end of an accounting period in accordance with the provision of a retail shop lease implied by section 33, reduce the total amount of the non-specific outgoings to which all lessees of retail shops in the retail shopping centre are liable to contribute in respect of the accounting period by an amount calculated in accordance with the following formula in relation to each casual mall licence granted by the lessor permitting trade in the casual mall licence area during the accounting period:

$$R = \frac{TO}{TLA \times TD} \times CMLD \times CMLA$$

where—

**R** = the amount of the reduction;

**TO** = the total amount of the non-specific outgoings to which all lessees of retail shops in the shopping centre are liable to contribute in respect of the accounting period;

**TLA** = the total of the lettable areas of all the retail shops in the shopping centre in square metres;

**TD** = the total number of days in the accounting period;

**CMLD** = the number of days during which the person granted the casual mall licence was permitted to trade in the casual mall licence area during the accounting period;

**CMLA** = the casual mall licence area in square metres.

## **9—Rectification of certain breaches**

No proceedings are to be taken or continued against a lessor in respect of a breach of clause 5, 6 or 8 unless the lessor fails to rectify the breach as soon as reasonably practicable after being requested in writing to do so by a lessee who is directly affected by the breach.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Formerly

*Retail Shop Leases Act 1995*

### Legislation amended by principal Act

The *Retail and Commercial Leases Act 1995* amended the following:

*Magistrates Court Act 1991*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1995	14	<i>Retail Shop Leases Act 1995</i>	6.4.1995	30.6.1995 ( <i>Gazette</i> 29.6.1995 p2976) except ss 63—66—16.9.1996 ( <i>Gazette</i> 12.9.1996 p1124)
1996	38	<i>Statutes Amendment (Community Titles) Act 1996</i>	9.5.1996	ss 31 & 32—4.11.1996 ( <i>Gazette</i> 31.10.1996 p1460)
1997	56	<i>Retail Shop Leases Amendment Act 1997</i>	31.7.1997	6.10.1997 ( <i>Gazette</i> 4.9.1997 p612)
1998	77	<i>Shop Trading Hours (Miscellaneous) Amendment Act 1998</i>	17.12.1998	s 10—8.6.1999 ( <i>Gazette</i> 25.3.1999 p1462)
1999	33	<i>Financial Sector Reform (South Australia) Act 1999</i>	17.6.1999	Sch (item 46)—1.7.1999 being the date specified under s 3(16) of the <i>Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999</i> of the Commonwealth as the transfer date for the purposes of that Act: s 2(2)
1999	55	<i>Residential Tenancies (Miscellaneous) Amendment Act 1999</i>	12.8.1999	s 9—3.10.1999 ( <i>Gazette</i> 30.9.1999 p1341)
2001	43	<i>Retail and Commercial Leases (Miscellaneous) Amendment Act 2001</i>	3.8.2001	4.2.2002 ( <i>Gazette</i> 15.1.2002 p186)



2001	63	<i>Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001</i>	6.12.2001	1.9.2002 ( <i>Gazette</i> 22.8.2002 p3100)
2001	69	<i>Statutes Amendment (Courts and Judicial Administration) Act 2001</i>	6.12.2001	Pt 12 (ss 28 & 29)—3.2.2002 ( <i>Gazette</i> 24.1.2002 p346)
2003	19	<i>Shop Trading Hours (Miscellaneous) Amendment Act 2003</i>	19.6.2003	Sch (cl 2)—7.7.2003 ( <i>Gazette</i> 19.6.2003 p2598)
2003	44	<i>Statute Law Revision Act 2003</i>	23.10.2003	Sch 1—24.11.2003 ( <i>Gazette</i> 13.11.2003 p4048)
2009	84	<i>Statutes Amendment (Public Sector Consequential Amendments) Act 2009</i>	10.12.2009	Pt 132 (ss 300 & 301)—1.2.2010 ( <i>Gazette</i> 28.1.2010 p320)

## Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended by 44/2003 s 3(1) (Sch 1)	24.11.2003
Pt 1		
s 1	substituted by 56/1997 s 3	6.10.1997
s 2	<i>deleted by 44/2003 s 3(1) (Sch 1)</i>	24.11.2003
s 3		
s 3(1)		
certified exclusionary clause	inserted by 56/1997 s 4(a)	6.10.1997
retail shopping centre	amended by 38/1996 s 31	4.11.1996
statutory rights of security of tenure	inserted by 56/1997 s 4(b)	6.10.1997
s 4		
s 4(2)	amended by 56/1997 s 5 amended by 33/1999 Sch (item 46)	6.10.1997 1.7.1999
Pt 3		
s 12		
s 12(2) and (3)	substituted by 56/1997 s 6	6.10.1997
s 12(3a)	inserted by 56/1997 s 6	6.10.1997
s 13	substituted by 56/1997 s 7	6.10.1997
s 13(1)	amended by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 14		
s 14(1)		
preparatory costs	amended by 56/1997 s 8	6.10.1997
s 17	<i>deleted by 56/1997 s 9</i>	6.10.1997
Pt 4A	inserted by 56/1997 s 10	6.10.1997
s 20B		
s 20B(2)	amended by 44/2003 s 3(1) (Sch 1)	24.11.2003

**Retail and Commercial Leases Act 1995—24.11.2003 to 31.1.2010**

## Legislative history

## Pt 5

s 22

s 22(1) and (4) amended by 44/2003 s 3(1) (Sch 1) 24.11.2003

s 25

*deleted by 56/1997 s 11* 6.10.1997

ss 27 and 28

*deleted by 56/1997 s 12* 6.10.1997

s 29

amended by 44/2003 s 3(1) (Sch 1) 24.11.2003

s 32

amended by 56/1997 s 13 6.10.1997

## Pt 6

s 38

s 38(3) amended by 44/2003 s 3(1) (Sch 1) 24.11.2003

s 42

*deleted by 56/1997 s 14* 6.10.1997

## Pt 7

s 44

s 44(3) amended by 44/2003 s 3(1) (Sch 1) 24.11.2003

s 45

amended by 43/2001 s 3 4.2.2002

s 45A

inserted by 43/2001 s 4 4.2.2002

ss 47—49

*deleted by 56/1997 s 15* 6.10.1997

## Pt 8

s 52

amended by 44/2003 s 3(1) (Sch 1) 24.11.2003

s 57

amended by 44/2003 s 3(1) (Sch 1) 24.11.2003

s 60

s 60(2) amended by 56/1997 s 16 6.10.1997

s 61

s 61(1) amended by 19/2003 Sch cl 2(1) 7.7.2003

s 61(2a) inserted by 77/1998 s 10 8.6.1999

s 61(4) substituted by 19/2003 Sch cl 2(2) 7.7.2003

s 61(6) inserted by 19/2003 Sch cl 2(3) 7.7.2003

s 62

s 62(1) s 62 redesignated as s 62(1) by 38/1996 s 32 4.11.1996

s 62(2) inserted by 38/1996 s 32 4.11.1996

s 62A

inserted by 63/2001 s 3 1.9.2002

## Pt 9

s 69

s 69(1) amended by 69/2001 s 28 3.2.2002

## Pt 12

s 76

s 76(4) substituted by 55/1999 s 9(a) 3.10.1999

s 76(6) amended by 55/1999 s 9(b) 3.10.1999

s 81

s 81(2) amended by 56/1997 s 17 6.10.1997

s 82

*deleted by 44/2003 s 3(1) (Sch 1)* 24.11.2003

## Sch

deleted by 56/1997 s 18 6.10.1997

inserted by 63/2001 s 4 1.9.2002

## **Transitional etc provisions associated with Act or amendments**

### ***Statutes Amendment (Courts and Judicial Administration) Act 2001***

#### **29—Transitional provision**

The amendments made to the principal Act by this Part—

- (a) do not apply in respect of proceedings commenced before the commencement of this Part (and those proceedings may continue as if this Act had not been enacted); and
- (b) apply in respect of proceedings commenced after the commencement of this Part (including proceedings in respect of a claim arising before the commencement of this Part).

#### **Historical versions**

Reprint No 1—4.11.1996

Reprint No 2—6.10.1997

Reprint No 3—8.6.1999

Reprint No 4—1.7.1999

Reprint No 5—3.10.1999

Reprint No 6—4.2.2002

Reprint No 7—1.9.2002

Reprint No 8—7.7.2003