

Passed by both Houses



New South Wales

# Retail Leases Amendment Bill 2005

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2005*



New South Wales

## **Retail Leases Amendment Bill 2005**

Act No , 2005

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An Act to amend the *Retail Leases Act 1994* in relation to the rights and obligations of lessees and lessors under retail shop leases, the procedures for entering into retail shop leases, the deposit of retail lease security bonds with a government security deposit facility, and the jurisdiction of the Administrative Decisions Tribunal in connection with retail shop leases; to make a consequential amendment to the *Fines Act 1996*; and for other purposes.

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*I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.*

*Chairman of Committees of the Legislative Assembly.*

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Retail Leases Amendment Act 2005*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

**3 Amendment of Retail Leases Act 1994 No 46**

The *Retail Leases Act 1994* is amended as set out in Schedule 1.

**4 Amendment of Fines Act 1996 No 99**

The *Fines Act 1996* is amended as set out in Schedule 2.

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## Schedule 1      Amendment of Retail Leases Act 1994

(Section 3)

**[1] Part 1, note before section 1**

Omit “section 6”. Insert instead “sections 6, 6A and 84B”.

**[2] Section 3 Definitions**

Insert in alphabetical order:

***authorised deposit-taking institution*** means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth.

***business day*** means any day except Saturday or Sunday or a day that is a public or bank holiday throughout the State.

***Director-General*** means the Director-General of the Department of State and Regional Development.

***lettable area*** of a retail shop does not include:

- (a) car parking spaces, or
- (b) storage areas not attached to the retail shop premises where the business of the shop is or is to be carried on.

***listed business*** means a business prescribed for the purposes of paragraph (a) of the definition of ***retail shop*** (including a business for the time being specified in Schedule 1).

***retail specialty shop*** means a retail shop referred to in paragraph (a) of the definition of ***retail shop***, other than a department store, a supermarket or premises of a kind prescribed as excluded from this definition by the regulations.

***strata levies*** means contributions levied under the *Strata Schemes Management Act 1996* or any other Act relating to strata schemes.

***Tribunal*** means the Administrative Decisions Tribunal of New South Wales established by the *Administrative Decisions Tribunal Act 1997*.

**[3] Section 3, definition of “outgoings”**

Insert “and reasonably” after “directly” in paragraph (a).

**[4] Section 3, definition of “retail shop”**

Omit the definition. Insert instead:

*retail shop* means premises that:

- (a) are used, or proposed to be used, wholly or predominantly for the carrying on of one or more of the businesses prescribed for the purposes of this paragraph (whether or not in a retail shopping centre), or
- (b) are used, or proposed to be used, for the carrying on of any business (whether or not a business prescribed for the purposes of paragraph (a)) in a retail shopping centre.

**Note 1.** Section 5 limits the retail shops to which this Act applies.

**Note 2.** Clause 17 of Schedule 3 provides that the businesses specified in Schedule 1 are taken to be prescribed for the purposes of paragraph (a) of this definition until regulations prescribing businesses and repealing Schedule 1 are made.

**[5] Section 3, definition of “retail shop lease” or “lease”**

Omit “Section 6 limits” from the note.

Insert instead “Sections 6, 6A and 84B limit”.

**[6] Section 3, definition of “retail shopping centre”**

Omit “of the businesses specified in Schedule 1” from paragraph (a).

Insert instead “listed businesses”.

**[7] Section 3, definition of “specialist retail valuer”**

Omit the definition. Insert instead:

*specialist retail valuer* means:

- (a) for the purposes of a valuation under this Act relating to a retail specialty shop in a retail shopping centre having both:
  - (i) 20 or more retail specialty shops, and
  - (ii) a total of lettable areas of retail specialty shops that exceeds 1,000 square metres,a valuer having not less than 5 years’ experience in valuing retail specialty shops in shopping centres of that kind, or
- (b) for the purposes of a valuation under this Act relating to any other retail specialty shop or any other retail shop, a valuer having not less than 5 years’ experience in valuing retail shops.

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**[8] Section 6 Leases to which Act does not apply**

Omit section 6 (1) (a).

**[9] Section 6A**

Insert after section 6:

**6A Application of Act to short-term leases**

**(1) Generally, Act not to apply to short-term leases**

Subject to subsection (2), this Act does not apply to a lease of a retail shop for a term of less than 6 months without any right for the lessee to extend the lease (whether by means of an option to extend or renew the lease or otherwise).

**(2) Exception for successive, extended or renewed leases for more than one year**

If the lessee has been in possession or entitled to be in possession of the retail shop without interruption for more than one year (whether by means of a series of 2 or more leases or by means of an extended or renewed lease or leases, or by any combination of those means), this Act applies to:

- (a) the lease on and from the day on which the lessee has been in possession or entitled to be in possession of the shop for more than one year, and
- (b) any succeeding lease or leases of the shop to the lessee, where possession or entitlement to possession is not interrupted.

**(3) Operation of provisions for disclosure statements**

Section 11 does not apply to the lease referred to in subsection (2) (a), but applies to any succeeding lease referred to in subsection (2) (b).

**(4) Operation of provisions for minimum 5 year term**

Section 16 (1) and (2) do not apply to the lease referred to in subsection (2) (a) unless the lessee notifies the lessor in writing during the term of the lease that the lessee elects to have the benefit of section 16. However, in that case, any period for which the lessee has already been in possession or entitled to possession of the retail shop without interruption is taken to be included in the term of the lease.

(5) **Operation of other provisions**

The regulations may provide that, if this Act applies to a lease because of subsection (2), specified provisions of this Act (other than sections 11 and 16 (1) and (2) and Part 2A) do not apply to or in respect of the lease or apply with prescribed modifications.

(6) **Certain interruptions do not break continuity**

The regulations may provide that interruptions for a prescribed period or of a prescribed kind are to be disregarded for the purposes of this section.

(7) **Holding over**

For the purposes of subsection (1), a provision for holding over by the lessee at the end of the term of the lease does not confer a right on the lessee to extend the lease if it operates at the discretion of each of the lessee and the lessor.

(8) **Assignment**

This section has effect in relation to a lease whether or not it is assigned to another person, but if it is assigned the period of possession or entitlement to possession by the assignee is taken to include any period of possession or entitlement to possession by the assignor and any previous assignor.

**[10] Section 9 Copy of lease and retail tenancy guide to be provided at negotiation stage**

Omit section 9 (b). Insert instead:

- (b) the person makes:
  - (i) a copy of the proposed lease, and
  - (ii) if the regulations so provide—a copy of a retail tenancy guide prescribed by or identified in the regulations,  
available to any prospective lessee as soon as the person enters into negotiations with the prospective lessee concerning the lease.

**[11] Section 9 (2)**

Insert at the end of the section:

- (2) The copy of the retail tenancy guide to be made available to a prospective lessee may be or be a copy of:
  - (a) the officially printed guide, or

- (b) a version of the guide printed from a website of a government department or authority or from a website identified in the regulations.

**[12] Section 11 Lessor's disclosure statement**

Omit "Part 1 of the form contained in Schedule 2" where firstly occurring in section 11 (1).

Insert instead "the prescribed form".

**[13] Section 11 (1)**

Omit "form set out in Part 1 of the form contained in Schedule 2".

Insert instead "prescribed form".

**[14] Section 11 (1)**

Omit "as set out in Part 2 of the form contained in Schedule 2".

Insert instead "in the form prescribed for the purposes of section 11A".

**[15] Section 11**

Insert at the end of the section:

**Note.** Clause 20 of Schedule 3 provides that the forms set out in Schedule 2 are taken to be prescribed for the purposes of sections 11 and 11A until regulations prescribing the forms and repealing Schedule 2 are made.

**[16] Section 11A Lessee's disclosure statement**

Omit "Part 2 of the form contained in Schedule 2" where firstly occurring in section 11A (1).

Insert instead "the prescribed form".

**[17] Section 11A (1)**

Omit "form set out in Part 2 of the form contained in Schedule 2".

Insert instead "prescribed form".

**[18] Section 11A**

Insert at the end of the section:

**Note.** Clause 20 of Schedule 3 provides that the form set out in Part 2 of Schedule 2 is taken to be prescribed for the purposes of section 11A until regulations prescribing the form and repealing Schedule 2 are made.



**[19] Sections 13 and 13A**

Insert after section 12:

**13 Costs before fit-out**

- (1) This section applies if a lessee of a retail shop is liable to pay an amount for, or associated with, any works carried out by or on behalf of the lessor (before or after the lease is entered into) to enable the proposed fit-out of the shop by the lessee.
- (2) The maximum amount of the costs of the works, or a basis or formula with respect to those costs, is to be agreed in writing by the lessor and lessee before the lease is entered into.
- (3) The lessee is not liable to pay an amount in respect of the works that is more than the agreed maximum amount.
- (4) A reference in this section to a lessor or lessee includes a reference to a prospective lessor or prospective lessee.

**13A Tenancy fit-out statement or guide**

- (1) If a prospective lessor of a retail shop in a retail shopping centre requires a particular standard of construction for fit-outs to be carried out by the lessee, the relevant information relating to the standard must be contained in a tenancy fit-out statement (which may be described as a tenancy fit-out guide):
  - (a) accompanying the lessor's disclosure statement, or
  - (b) accompanying or included in the lease or any agreement for the lease of the shop.
- (2) The lessee is not liable to carry out any fit-out of the kind referred to in subsection (1) to the extent that it is not covered by the tenancy fit-out statement.
- (3) This section does not affect the operation of section 38.

**[20] Section 14 Key-money and lease preparation expenses prohibited**

Omit "bond or security deposit" from section 14 (3) (c).

Insert instead "security bond or other bond".

**[21] Section 16 Minimum 5 year term**

Omit section 16 (3). Insert instead:

- (3) This section does not apply to a lease if a lawyer, or a licensed conveyancer, not acting for the lessor certifies (before, or within 6 months after, the lease was entered into) in writing that:

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- (a) the lessee or prospective lessee requested the lawyer or conveyancer to give the certificate, and
  - (b) the lawyer or conveyancer has explained to the lessee or prospective lessee the effect of subsections (1) and (2) and that the giving of the certificate will result in this section not applying to the lease.

If the certificate is given within 6 months after the lease was entered into, then, without affecting the validity of the lease, subsection (2) ceases to apply to the lease and the extension of the term of the lease effected by that subsection accordingly ceases to be operative.

- (3A) The regulations may prescribe matters that must be included in a certificate under subsection (3) and procedures that must be complied with in connection with the giving or handling of such a certificate.

**[22] Part 2A**

Insert after Part 2:

**Part 2A Security bonds**

**Division 1 Preliminary**

**16A Definitions**

- (1) In this Part:

*approved form* means a form approved by the Director-General.

*authorised officer* means:

- (a) the Director-General, or
- (b) a person appointed by the Director-General to be an authorised officer:
  - (i) for the purposes of this Part generally, or
  - (ii) for the purposes of a particular provision of this Part in which the expression is used.

*money* includes a cheque.

*prescribed proceedings* means:

- (a) proceedings in a court (other than a prosecution) or before the Tribunal in relation to any matter which, under the terms or conditions of a lease, could, but for this Part, have given rise to a claim in relation to a security bond

deposited or paid in accordance with those terms or conditions, or

- (b) mediation of a retail tenancy dispute concerning such a claim.

**security bond**, in relation to a lease or proposed lease, means an amount of money that:

- (a) was (before or after the lease became, or the proposed lease becomes, binding on the parties) deposited with or paid to:
    - (i) the lessor, or
    - (ii) another person, in accordance with the directions of the lessor or the terms or conditions of the lease or proposed lease, or
    - (iii) another person acting on behalf of the lessor, and
  - (b) was so deposited or paid in such a way that the effect is to secure, otherwise than by payment of rent in advance, the lessor against any failure by a lessee to comply with any terms or conditions (irrespective of whether those terms or conditions are related to payment of rent or not) applying to or in connection with the lease or proposed lease.
- (2) An amount of money deposited with or paid to a person as referred to in paragraph (a) (ii) or (iii) of the definition of **security bond** in subsection (1) in respect of a lease is, for the purposes of section 16C, taken to be deposited with or paid to the lessor under that lease.
- (3) For the purposes of the definition of **security bond** in subsection (1), where:
- (a) money is deposited or paid as referred to in that definition in relation to a proposed lease, and
  - (b) a lease between the parties, and of the premises, to which the proposal relates is entered into,
- the lease entered into is taken to be the lease proposed at the time the money is deposited or paid, whether or not the lease entered into differs from the lease proposed at that time.

#### **16B Guarantees and other forms of security**

- (1) A retail shop lease is taken to include a provision to the effect that the lessor is not entitled to unreasonably refuse to accept a guarantee from an authorised deposit-taking institution in satisfaction of any requirement to provide a security bond or

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other bond or a third party guarantee for the performance of the lessee's obligations under the lease.

- (2) Security provided otherwise than in the form of a security bond is not otherwise subject to the requirements of this Part.

## **Division 2      Deposit of security bonds with Director-General**

### **16C    Deposit of security bonds with Director-General**

- (1) This section applies where a lessor receives a security bond for a lease or a proposed lease on or after the commencement of this section.
- (2) The lessor must deposit with the Director-General an amount of money equivalent to the amount of the security bond not later than 20 business days (or, where some other period is prescribed for the purposes of this subsection, that other period) after:
- (a) the date of receipt of the security bond, or
  - (b) the date on which the lease became, or the proposed lease becomes, binding on the parties,
- whichever is the later.
- (3) If a lessor's agent receives on behalf of the lessor a security bond for a lease or proposed lease, subsection (2) extends to require the agent to deposit with the Director-General an amount of money equivalent to the amount of that security bond and so extends as if a reference in that subsection to a lessor were a reference to the agent.
- (4) The Director-General may, without affecting the obligation imposed on a lessor or lessor's agent under this section, refuse to accept any amount tendered for deposit under subsection (2) that is not accompanied by a notification in or to the effect of the approved form duly completed.
- (5) If a security bond that is (pursuant to section 82) exempt from the operation of subsection (2) subsequently ceases to be exempt, this section applies to the bond as if it had been received when it ceased to be exempt.
- (6) The Minister, by instrument in writing, may, in any particular case or class of cases, extend the period prescribed by or under subsection (2).
- (7) Subsection (2) has effect despite the terms of a lease, any rule of law or the provisions of any other Act.

**16D    Deposit of existing security bonds with Director-General**

- (1) This section applies in either of the following circumstances:
- (a) where, before the commencement of this section, a lessor under a lease or proposed lease received a deposit or payment of money that, if it had been received after that commencement, would have been a security bond,
  - (b) where:
    - (i) a lessor under a lease or proposed lease, to which this Act does not apply, received a deposit or payment of money as a security bond, and
    - (ii) this Act afterwards becomes applicable to the lease because of the operation of section 6A or for any other cause.

For the purposes of this section, the *relevant day* is the date of commencement of this section (in circumstances to which paragraph (a) applies) or the day when this Act becomes applicable to the lease (in circumstances to which paragraph (b) applies).

- (2) The lessor, or the lessor's agent, must deposit with the Director-General within 3 months after the relevant day an amount of money equivalent to the current balance of the amount deposited or paid.
- (3) The *current balance* is the amount of money deposited or paid, together with any interest or similar payments, and less:
- (a) any amount that:
    - (i) has been deducted by way of fees or charges by an authorised deposit-taking institution, or
    - (ii) has been refunded or become refundable, or
    - (iii) has become the property of the lessor, or
    - (iv) has become subject to prescribed proceedings, or
    - (v) is payable to the lessee by way of interest earned, before or during the period referred to in subsection (2), or
  - (b) any amount of a kind prescribed by the regulations.
- (4) The Director-General may, without affecting the obligation imposed on a lessor under subsection (2), refuse to accept any amount tendered for deposit under that subsection that is not accompanied by a notification in or to the effect of the approved form duly completed.

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- (5) If a security bond that is (pursuant to section 82) exempt from the operation of subsection (2), subsequently ceases to be exempt, section 16C applies to the bond as if it had been received when it ceased to be exempt, and this section ceases to apply to the bond.
  - (6) The Minister, by instrument in writing, may, generally or in any particular case or class of cases, extend the period prescribed by subsection (2).
  - (7) Subsection (2) has effect despite the terms of a lease, any rule of law or the provisions of any other Act.

**16E Provisions in leases relating to security bonds**

- (1) No one (other than the Director-General) is, in respect of any period after the date that an amount of money equivalent to the amount of a security bond is deposited with the Director-General, entitled to receive interest in respect of the bond.
- (2) This section does not prevent the payment under section 16H or 16I of an amount equivalent to interest as referred to in section 16M.
- (3) If, but for this Part, a lessor or lessee would have a claim against a security bond under the terms and conditions of a lease for an amount that cannot be recovered under any other provision of those terms and conditions:
  - (a) the lessor may recover from the lessee as a debt an amount equivalent to the amount of the claim that the lessor would have had against that security bond, and
  - (b) the lessee may recover from the lessor as a debt an amount equivalent to the amount of the claim that the lessee would have had against that security bond.

**Division 3 Payment out of security bonds**

**16F Interpretation**

In this Division, a reference to an amount of money, in relation to a lease, is a reference to an amount of money equivalent to the amount of money, or part of the amount of money, as the case may require, held on deposit by the Director-General in respect of that lease.

**16G Application for payment**

- (1) An application to the Director-General to pay out an amount of money in respect of a lease may be made:

- (a) jointly by the lessor and the lessee, or
  - (b) by the lessor alone, or
  - (c) by the lessee alone.
- (2) An application is to be in or to the effect of the approved form and may:
- (a) in the case of an application of a kind referred to in section 16H (1)—be made at any time, or
  - (b) in the case of an application of a kind referred to in section 16H (2) or (3)—be made on termination of the lease.
- (3) An application by the lessor alone and an application by the lessee alone may, at the discretion of the Director-General, be treated as having been made jointly by the lessor and the lessee, if the applications are substantially the same.

**16H Payment on application**

(1) **Payment on joint application or to other party**

If an application under section 16G:

- (a) is made jointly by a lessor and a lessee under a lease, or
- (b) is made by a lessor under a lease who, in that application, directs the Director-General to pay out an amount of money to the lessee, or
- (c) is made by a lessee under a lease who, in that application, directs the Director-General to pay out an amount of money to the lessor,

the Director-General must pay out an amount of money as directed in that application.

(2) **Notice to lessee of application by lessor for payment to lessor**

If an application under section 16G is made by a lessor alone under a lease who, in that application, directs the Director-General to pay out an amount of money to the lessor, the Director-General must give notice in writing of the receipt of the application to the lessee.

(3) **Notice to lessor of application by lessee for payment to lessee**

If an application under section 16G is made by a lessee alone under a lease who, in that application, directs the Director-General to pay out an amount of money to the lessee, the Director-General must give notice in writing of the receipt of the application to the lessor.

(4) **Payment to applicant lessor**

If a lessee to whom notice has been given under subsection (2):

- (a) does not, within 14 days (or, where some other period is prescribed for the purposes of this subsection, that period) after service on the lessee of the notice or the date of posting of the notice, as the case may be, notify the Director-General in writing that the lessee has commenced prescribed proceedings in relation to an amount of money referred to in the notice, or
- (b) does so notify the Director-General, but those proceedings are discontinued,

the Director-General must pay out that amount to the lessor.

(5) **Payment to applicant lessee**

If a lessor to whom notice has been given under subsection (3):

- (a) does not, within 14 days (or, where some other period is prescribed for the purposes of this subsection, that period) after service on the lessor of the notice or the date of posting of the notice, as the case may be, notify the Director-General in writing that the lessor has commenced prescribed proceedings in relation to an amount of money referred to in the notice, or
- (b) does so notify the Director-General, but those proceedings are discontinued,

the Director-General must pay out that amount to the lessee.

(6) **Payment of balance to other party**

If an application referred to in subsection (2) or (3) is made in respect of part of an amount of money held on deposit by the Director-General in respect of a lease, the Director-General must pay out to the other party to the lease the remainder of the amount.

(7) **Conflicting applications**

If conflicting applications are received, the Director-General may disregard the later or latest application received.

(8) **Notice: exceptions**

Without limiting subsection (7), the regulations may provide that the Director-General need not give notice under subsection (2) or (3) in such circumstances as may be prescribed.



**(9) Extension of period in particular cases**

The Director-General may in any particular case extend the period prescribed by or under subsection (4) or (5).

**16I Payment after prescribed proceedings**

- (1) If a lessor or lessee under a lease has, within the period prescribed by or under section 16H (4) or (5), commenced prescribed proceedings in relation to the lease and judgment in the proceedings has been entered in or given by a court or a court or the Tribunal has made an order in those proceedings for the payment of money:
  - (a) the Director-General must:
    - (i) on being served with or obtaining a copy of that judgment or order, and
    - (ii) on being satisfied that the judgment or order has not been satisfied and no steps to enforce the judgment or order have been taken under any other Act,pay out an amount of money held by the Director-General on deposit in respect of the lease, as if the Director-General were the person obliged to pay under the judgment or order, or
  - (b) where the Director-General is satisfied that:
    - (i) the judgment has been entered or given, or the order made, and
    - (ii) that judgment or order has been satisfied (other than as provided in paragraph (a)),the Director-General must pay out that amount of money to the person obliged to pay under the judgment or order.
- (2) If mediation of a retail tenancy dispute about a security bond has been successful and a certificate has been issued under section 16N (3) setting out the terms of the agreement, the Director-General must, on being served with or obtaining a copy of the certificate, pay out in conformity with the agreement an amount of money held by the Director-General on deposit in respect of the lease concerned.
- (3) For all purposes, money paid out by the Director-General under subsection (1) is taken to be money paid by the person against whom the judgment was obtained or the order was made.

**16J Excess not payable**

- (1) This section applies where, in respect of a lease, the Director-General would, but for this section, be required to pay out an amount of money and that amount of money is in excess of the amount of money held on deposit by the Director-General in respect of the lease.
- (2) The Director-General:
  - (a) must refuse to pay out the money, and
  - (b) must treat applications for payment out of the money as having been withdrawn, and
  - (c) must inform the applicants accordingly.
- (3) This section has effect despite any other provision of this Part.

**16K Appeal rights**

- (1) The Director-General may, not earlier than 14 days after receiving notice of a judgment or order relating to a security bond, pay out money in respect of the judgment or order even if there is a right of appeal against the judgment or order, but only if an appeal has not been lodged.
- (2) If an appeal has been lodged, the Director-General must not pay out money in respect of the judgment or order unless satisfied that the appeal has been withdrawn or dismissed.
- (3) A payment of money by the Director-General in respect of a judgment or order does not prevent an appeal being lodged.

**16L Withdrawal of application**

If prescribed proceedings have not been commenced in relation to an amount of money held by the Director-General within the period prescribed by or under section 16H (4) or (5):

- (a) a lessor or a lessee may, at any time before a payment is made in accordance with an application made by the lessor or lessee, withdraw the application, and
- (b) for the purposes of this section, the application is thereupon taken never to have been made.

**16M Payment out of amount equivalent to interest**

- (1) This section applies to amounts paid out by the Director-General under section 16H or 16I in respect of security bonds lodged with the Director-General.

- (2) The total amount available to be paid out in respect of a security bond is to include an amount equivalent to interest at the rate prescribed by the regulations for the time being:
  - (a) calculated on the minimum monthly balances from time to time of the security bond held by the Director-General, and
  - (b) compounded as prescribed by the regulations.
- (3) For the purposes of subsection (2) (a), *minimum monthly balance* means the minimum balance during any complete named month during which money in respect of a security bond is held by the Director-General.

**Note.** Clause 23 of Schedule 3 provides that, until regulations are made for the purposes of section 16M (2), regulations are taken to include provisions referred to in that clause.

#### **16N Miscellaneous provisions**

- (1) If the Director-General is required to pay out an amount of money to a person under this Part, the Director-General may, instead of paying out the money to that person, pay out or apply the money in accordance with that person's directions.
- (2) For the purposes of this Act, a court or the Tribunal is authorised to issue:
  - (a) a copy of any entry of a judgment or a copy of an order, in each case certified by the proper officer to be a true copy of the entry or order, and
  - (b) where proceedings have been discontinued, a certificate to that effect signed by the proper officer.
- (3) If a mediation of a retail tenancy dispute about a security bond is successful, the mediator or the Registrar may issue a certificate setting out the resulting agreement.

**Note.** The certificate may be used for the purposes of section 16I.
- (4) No claim other than a claim provided in this Part lies against the Director-General in respect of security bonds deposited with the Director-General.
- (5) This Part applies notwithstanding the terms of any agreement, any rule of law or the provisions of any other Act.

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## **Division 4      Enforcement provisions**

### **16O    Receipts to be given for security bonds**

- (1) A lessor, or the lessor's agent, receiving money deposited or paid as a security bond must, at the time of receiving the money, give or cause to be given to the person making the deposit or payment a receipt for the money.
- (2) A receipt given under subsection (1) must contain the following particulars:
  - (a) the names of the lessor and lessee,
  - (b) a sufficient identification of the retail shop concerned,
  - (c) the amount of money received,
  - (d) the date the money was received,
  - (e) such other particulars as are prescribed for the purposes of this subsection.
- (3) A lessor, or the lessor's agent, must keep or cause to be kept, in the manner (if any) and for such term (if any) as are prescribed, a copy of each receipt given under this section.

**Note.** Clause 24 of Schedule 3 provides that, until regulations are made for the purposes of section 16O (3), regulations are taken to include a provision referred to in that clause.

### **16P    Penalty notices**

- (1) An authorised officer may serve a penalty notice on a person if:
  - (a) it appears to the officer that the person has committed an offence against this Part or regulations made for the purposes of this Part, and
  - (b) the regulations prescribe the offence as being one for which a penalty notice may be issued.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person may pay, within the time and to the person specified in the notice, the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.
- (4) If the amount of the penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.

- (5) Payment under this section is not an admission of liability for the purposes of, and does not affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (6) The regulations may:
  - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
  - (b) prescribe the amount of penalty for an offence if dealt with under this section, and
  - (c) prescribe different amounts of penalty for different offences or classes of offences.
- (7) The amount of penalty prescribed under this section for an offence may not exceed the maximum amount of penalty that could be imposed for the offence by a court.
- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.

**16Q Offences and penalty**

- (1) Any person who contravenes, whether by act or omission, any provision of this Part is guilty of an offence against this Act.
- (2) Any person who is guilty of an offence under this Part is, on conviction, liable to a penalty not exceeding 20 penalty units.
- (3) This section does not apply to the Director-General or a person acting for or on behalf of the Director-General.

**16R Offences by corporations**

- (1) If a corporation contravenes any provision of this Part or regulations made for the purposes of this Part, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.

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- (4) This section does not apply to a person in the person's capacity as a director of, or as a person concerned in the management of, a corporation constituted by or under an Act.

**16S Time for commencing proceedings for offences**

Despite anything in any Act, proceedings for an offence against this Part or regulations made for the purposes of this Part may be brought:

- (a) in the case of an offence in relation to a security bond for a lease or a proposed lease—at any time before the expiration of the period of 3 years that next succeeds:
- (i) the commission of the offence, or
  - (ii) the termination of the lease,
- whichever is the later, or
- (b) in any other case—at any time before the expiration of the period of 3 years that next succeeds the commission of the offence.

**Division 5 Accounts**

**16T Accounts**

The following accounts are to be established in accordance with law:

- (a) a Retail Leases Security Bonds Trust Account (referred to in this Division as the *Trust Account*),
- (b) a Retail Leases Security Bonds Interest Account (referred to in this Division as the *Interest Account*).

**16U Retail Leases Security Bonds Trust Account**

- (1) There is to be paid into the Trust Account all security bonds deposited with the Director-General in accordance with Division 2.
- (2) There is payable from the Trust Account:
- (a) security bonds authorised to be paid out under section 16H or 16I, and
  - (b) any other payments authorised by or under this or any other Act to be made from that account.

**16V Retail Leases Security Bonds Interest Account**

- (1) There is to be paid into the Interest Account all interest received on investments of money in the Trust Account.

- (2) There is payable from the Interest Account:
  - (a) the costs of, or the expenses incurred in, the administration of this Act, and
  - (b) any other payments authorised by or under this or any other Act to be made from that account.
- (3) There is payable from the Interest Account such contributions as are agreed annually by the Minister and the Treasurer for payment to the Consolidated Fund.
- (4) Contributions referred to in subsection (3) are to be paid in the manner determined by the Treasurer.
- (5) There may be paid from the Interest Account all amounts payable because of the operation of section 16M.

**16W Agents of Director-General**

- (1) Any money received, invested or paid out by an agent of the Director-General for the purposes of this Part is taken to have been received, invested or paid out, as the case may be, by the Director-General.
- (2) Any money received by an agent of the Director-General for the purposes of this Part is taken to have been received by the Director-General on the day that it is received by the agent.

**Division 6 General**

**16X Exemptions**

- (1) For the purposes of, but without affecting the generality of, section 82, a class of security bond may be described by reference to a class of lease or a class of premises in respect of which security bonds are deposited or paid.
- (2) For the purposes of, but without affecting the generality of, subsection (1), a class of lease may be described by reference to periods of continuous occupancy of premises under leases or by reference to terms or conditions of leases.

**16Y Continuous occupation**

For the purposes of this Part and regulations made in connection with security bonds, where the same lessee continuously occupies the same retail shop under a series of leases from the same lessor, those leases are taken to be one lease.

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**16Z Annual report**

The annual report of the Department of State and Regional Development is to include a report of the security bond scheme under this Part.

**16ZA Service of notices and other documents on Director-General**

- (1) Any notice, summons, writ or other proceeding relating to or connected with this Part to be served on the Director-General may be served:
  - (a) by being left, or
  - (b) in the case of a notice, by posting it addressed to the Director-General,  
at the office of the Director-General.
- (2) A letter giving a notice in writing to a lessor or lessee by post under Division 3 is taken to be properly addressed if it is addressed to that lessor or lessee at his or her last known address according to the records of the Director-General.
- (3) This section does not affect the generality of section 81A.

**16ZB Recovery of money**

Any charge, fee or money due to the Director-General in connection with this Part may be recovered as a debt or liquidated demand in a court of competent jurisdiction.

**16ZC Regulations**

- (1) The regulations may make provision for or with respect to the scheme provided by this Part, including (without limiting the foregoing) the manner in which money is to be deposited with or paid by the Director-General.
- (2) Without affecting the generality of section 85, wherever a provision of this Part requires a form to be prescribed or a document to be in writing, the regulations may prescribe:
  - (a) a form to be used for that purpose, and
  - (b) where that form or document is required to be lodged with or served on or sent to any person—the manner of lodgment, service or sending, and
  - (c) particulars or information to be provided by a person completing that form or document.
- (3) Regulations made for the purposes of this Part may create offences punishable by a penalty not exceeding 3 penalty units.



**[23] Section 19 Reviews of current market rent**

Insert “as between a willing lessor and a willing lessee in an arm’s length transaction (where the parties are each acting knowledgeably, prudently and without compulsion),” after “shop,” in section 19 (1) (a).

**[24] Section 19 (1) (b)**

Omit the paragraph. Insert instead:

- (b) 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 specialist retail valuer appointed by agreement of the parties to the lease, or failing agreement, by the Tribunal.

**[25] Section 19 (1) (d)**

Omit the paragraph. Insert instead:

- (d) The lessor must, not later than 14 days after being requested to do so by a specialist retail valuer appointed under paragraph (b), supply the valuer with information (where reasonably available to the lessor) requested in a list provided by the valuer to assist the valuer to determine the current market value, including the following information about leases for comparable retail shops in the same building or retail shopping centre:
  - (i) current rental for each lease,
  - (ii) rent free periods or any other form of incentive,
  - (iii) recent or proposed variations of any lease,
  - (iv) outgoings for each lease,and including any other information prescribed by the regulations.

**[26] Section 19 (1A) and (1B)**

Insert after section 19 (1):

- (1A) A party to a lease may apply to the Tribunal for the appointment of a specialist retail valuer for the purposes of subsection (1) (b).
- (1B) A party to a lease may make written submissions to a specialist retail valuer to assist in the valuer’s consideration of the valuation, and the valuer must consider any such written submissions.

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**[27] Section 19 (2)**

Omit “after accepting the appointment to make the valuation”.

Insert instead “after receiving the information referred to in subsection (1) (d)”.

**[28] Section 19 (4)**

Insert after section 19 (3):

- (4) The reasons and matters included in a valuation as referred to in subsection (1) (e) must not be set out in a way that discloses information identifying other leases or parties to other leases or relating to the business of parties to other leases. This subsection does not apply to leases between the parties to the lease for which the valuation is made or to leases whose parties consent to the disclosure of the information.

**[29] Section 21A**

Insert after section 21:

**21A Rent variations for short-term leases**

- (1) This section applies to a lease where the term of the lease is extended by the operation of section 16 (2) and the lease does not contain provisions for the variation of the rent during the additional period. The lease is taken to contain provisions of that kind if the provisions are expressed generally so as to be capable in their terms of applying throughout the whole term of the lease.  
**Note.** This section would not apply to a lease for 3 years extended to 5 years by the operation of section 16 (2) if the lease contained provisions for “annual” increases of rent without expressly limiting the increases to the 3-year term.
- (2) The lease is taken to provide that the lessor may increase the rent as from the date of commencement of the additional period and thereafter annually from that date.
- (3) The amount of rent periodically payable resulting from an increase under subsection (2) must not exceed the base amount, adjusted in line with movements in the Consumer Price Index (All Groups Index) for Sydney and rounded up to the nearest dollar. The base amount is the corresponding amount of rent payable immediately before the date of commencement of the additional period.

**[30] Section 27**

Omit the section. Insert instead:

**27 Outgoings estimates**

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 lessor's disclosure statement prescribed for the purposes of section 11,
- (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 1 month before the commencement of the accounting period concerned,
- (c) if the shop is in a retail shopping centre, the estimate of outgoings is to include:
  - (i) a statement of management fees, broken down into the fees to be paid by the lessee towards the administration costs of running the centre and other fees paid to the management company, and
  - (ii) a statement of cleaning costs to be paid by the lessee, broken down into the costs of consumables and other costs, and
  - (iii) any other particulars prescribed by the regulations.

**[31] Section 28 Outgoings statements**

Insert after section 28 (b):

- (b1) If the shop is in a retail shopping centre, the outgoings statement is to include:
  - (i) a statement of total management fees paid in respect of the centre, broken down into the fees paid towards the administration costs of running the centre and other fees paid to the management company, and
  - (ii) a statement of total cleaning costs paid by the lessor, broken down into the costs of consumables and other costs, and
  - (iii) any other particulars prescribed by the regulations.

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**[32] Section 28 (h)**

Omit “and insurance”. Insert instead “, insurance and strata levies”.

**[33] Section 28 (2) and (3)**

Insert at the end of the section:

- (2) An auditor preparing a report under subsection (1) (e) or the lessor must ensure that the lessee is given a reasonable opportunity to make a written submission to the auditor on the accuracy of the lessor’s proposed outgoings statement. The auditor need not contact the lessee for the purposes of this subsection if the lessor advises the auditor that the lessor has informed the lessee of the lessee’s opportunity under this subsection.
- (3) The auditor must consider any written submissions made pursuant to subsection (2).

**[34] Section 28A**

Insert after section 28:

**28A Non-provision of outgoings estimate or statement**

- (1) A lessee is entitled to withhold payment of contributions for outgoings if:
  - (a) the lessor has failed to give the lessee a written estimate of outgoings required under section 27 or an outgoings statement required under section 28, and
  - (b) the lessee has, at or after the expiry of the time when the estimate or statement was required to be given to the lessee, requested the lessor in writing to furnish the estimate or statement to the lessee, and
  - (c) the lessor’s failure has continued for 10 business days after the request was made.
- (2) The lessee must pay the withheld contributions within 28 days after the lessor furnishes the estimate or statement.
- (3) The lessor is not entitled to recover interest or late payment charges in respect of contributions withheld in accordance with this section.
- (4) The lessee is not in breach of the retail shop lease for acting in accordance with this section.

- (5) This section does not affect any other rights that the lessee has in connection with the lessor's failure to provide the estimate or statement.

**[35] Section 31 Reviews of current market rent**

Insert "as between a willing lessor and a willing lessee in an arm's length transaction (where the parties are each acting knowledgeably, prudently and without compulsion)," after "shop," in section 31 (1) (a).

**[36] Section 31 (1) (b)**

Omit the paragraph. Insert instead:

- (b) 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 specialist retail valuer appointed by agreement of the parties to the lease, or failing agreement, by the Tribunal.

**[37] Section 31 (1) (d)**

Omit the paragraph. Insert instead:

- (d) The lessor must, not later than 14 days after being requested to do so by a specialist retail valuer appointed under paragraph (b), supply the valuer with information (where reasonably available to the lessor) requested in a list provided by the valuer to assist the valuer to determine the current market value, including the following information about leases for comparable retail shops in the same building or retail shopping centre:
- (i) current rental for each lease,
  - (ii) rent free periods or any other form of incentive,
  - (iii) recent or proposed variations of any lease,
  - (iv) outgoings for each lease,
- and including any other information prescribed by the regulations.

**[38] Section 31 (1A) and (1B)**

Insert after section 31 (1):

- (1A) A party to a lease may apply to the Tribunal for the appointment of a specialist retail valuer for the purposes of subsection (1) (b).

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(1B) A party to a lease may make written submissions to a specialist retail valuer to assist in the valuer's consideration of the valuation, and the valuer must consider any such written submissions.

**[39] Section 31 (2)**

Omit "after accepting the appointment to make the valuation".

Insert instead "after receiving the information referred to in subsection (1) (d)".

**[40] Section 31 (4)**

Insert after section 31 (3):

(4) The reasons and matters included in a valuation as referred to in subsection (1) (e) must not be set out in a way that discloses information identifying other leases or parties to other leases or relating to the business of parties to other leases. This subsection does not apply to leases between the parties to the lease for which the valuation is made or to leases whose parties consent to the disclosure of the information.

**[41] Section 32 Opportunity for lessee to have current market rent determined early**

Omit "or the last day of the term of the lease, whichever is the earlier" from section 32 (1) (c).

**[42] Section 32 (1) (c)**

Insert at the end of the paragraph:

If the determination of rent is not notified within 21 days before the end of the term of the lease, the lessee may exercise the option within 21 days after the determination is notified in writing to the lessee (whether before or after the term of the lease), and the term of the lease is extended by the appropriate period to enable the lessee to exercise the option after the lease would otherwise expire.

**[43] Section 32A**

Insert after section 32:

**32A Review of current market rent determinations**

**(1) Application for review**

A party to a lease may apply to the Tribunal for the appointment of two specialist retail valuers to conduct a review of a

determination of the current market rent made by a specialist retail valuer made under section 19 or 31.

- (2) The application for a review must be made within 21 days after the party first received a copy of the determination.

**Note.** Subsection (13) provides another opportunity to make an application for a review if the decision on the review is set aside.

- (3) **Review by and decision of valuers**

The specialist retail valuers may conduct the review and may jointly:

- (a) affirm the reviewed determination, or
- (b) vary the reviewed determination.

- (4) Subject to this section, the provisions of sections 19 and 19A or sections 31 and 31A, as the case requires, apply (with any necessary adaptations) to and in respect of the specialist retail valuers in the same way as those provisions apply to and in respect of the original specialist retail valuer.

- (5) Without limiting subsection (4), the specialist retail valuers jointly and severally have the powers and obligations of the original specialist retail valuer in connection with obtaining information under the provisions referred to in that subsection.

- (6) The specialist retail valuers are to conduct the review and reach their decision not later than one month after they are notified of their appointment.

- (7) If the specialist retail valuers are unable to agree by the end of the month referred to in subsection (6), the valuers are taken to have decided to affirm the determination.

- (8) **Access to original determination and information**

It is the duty of the specialist retail valuer (the *original valuer*) who made the original determination, and of each party to the lease, to ensure that the specialist retail valuers reviewing the determination are given access to:

- (a) the original determination, and
- (b) information relating to the matters, specified in the original determination, to which the original valuer had regard to in making the original determination, to the extent that the information is available to the original valuer or party,

unless the specialist retail valuers indicate that they do not require access to the determination or information to be given to them under this subsection.

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(9) **Costs of review**

The following provisions apply to the costs of the review by the specialist retail valuers:

- (a) the parties to the lease are to pay the costs of the review in equal shares, unless paragraph (b) applies,
- (b) the party who applies for the appointment of the specialist retail valuers is to pay the costs of the review, if the current market value is jointly determined by the specialist retail valuers to be the same as or within 10 per cent of the amount specified in the original determination,
- (c) section 88 of the *Administrative Decisions Tribunal Act 1997* does not apply to the costs of the review.

(10) **Effect, finality and setting aside of decision**

A varied determination has effect as if it were the original determination.

(11) Subject to subsection (12), the joint decision of the specialist retail valuers is final and binding on the parties to the lease.

(12) The Tribunal:

- (a) may, on application made by a party to the lease within 21 days after the decision of the specialist retail valuers is given, order that the decision be set aside, if satisfied that the valuers have manifestly made a fundamental error warranting such an order, and
- (b) may also order that the costs of the review are not payable by the parties or, if paid, are to be refunded.

The decision is not otherwise reviewable by or appealable to the Tribunal.

(13) If the decision is set aside, a party to the lease may make a fresh application to the Tribunal under subsection (1) in relation to the original determination within the period of 21 days after the date of the order setting it aside, and this section applies accordingly.

**[44] Section 34 Lessee to be compensated for disturbance**

Omit section 34 (3). Insert instead:

- (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 any particular disturbance if a written statement specifically drawing the attention of the lessee to details of the anticipated disturbance was given to the lessee



before the lease was entered into, and the statement included the following:

- (a) a specific description of the nature of the disturbance,
  - (b) a statement assessing the likelihood of the disturbance occurring, including an indication of the basis on which the assessment was reached,
  - (c) a statement of the timing, duration and effect of the disturbance, so far as they can be predicted.
- (3A) A general statement to the effect that disturbances may occur during the term of the lease without setting out the matters referred to in subsection (3) is not a statement to which that subsection applies.

**[45] Section 34A Relocation**

Omit section 34A (f). Insert instead:

- (f) The lessee is entitled to payment by the lessor of the lessee's reasonable costs of the relocation, including but not limited to:
  - (i) costs incurred by the lessee in dismantling fittings, equipment or services, and
  - (ii) costs incurred by the lessee in replacing, re-installing or modifying finishes, fittings, equipment or services to the standard existing immediately before the relocation but only to the extent that they are reasonably required in the premises to which the lessee's business is relocated, and
  - (iii) legal costs incurred by the lessee.

**[46] Section 34A (g)**

Insert after section 34A (f) (before the note):

- (g) If the lessor and the lessee do not agree as to what the actual amount of reasonable costs of the relocation are to be, the amount of the costs is to be determined by a quantity surveyor:
  - (i) appointed by agreement between the parties to the lease, or
  - (ii) failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Quantity Surveyors.

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**[47] Section 40 Key-money on assignment prohibited**

Insert after section 40 (3) (before the note):

- (4) This section does not prevent a lessor from securing performance of the assignee's obligations under the assigned lease by requiring the provision of a security bond or other bond or a guarantee from the assignee or any other person.

**[48] Section 41 Procedure for obtaining consent to assignment**

Omit "form set out in Schedule 2A" wherever occurring.

Insert instead "prescribed form".

**[49] Section 41 (d)**

Omit the paragraph. Insert instead:

- (d) The lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if:
- (i) the lessee has complied with paragraphs (a) and (b), and
  - (ii) the lessor has not, within 28 days (or another period prescribed instead by the regulations) after the request was made or after the lessee complied with those paragraphs, whichever is the later, given notice in writing to the lessee either consenting or withholding consent.

**[50] Section 41**

Insert at the end of the section:

**Note.** Clause 20 of Schedule 3 provides that the form set out in Schedule 2A is taken to be prescribed for the purposes of section 41 until regulations are made prescribing the form and repealing Schedule 2A.

**[51] Section 41A Protection of assignors and guarantors**

Insert "(before the start of the period of 7 clear days before the assignment is effected)" after "gave" in section 41A (1).

**[52] Section 44A**

Insert after section 44:

**44A Negotiations for renewal or extension of lease**

- (1) A lessor of a retail shop must not, by written or broadcast advertisement, indicate the availability of the shop for lease or invite tenders or expressions of interest for tendering, during the term of the lease, unless:
  - (a) the lessor has offered the lessee a renewal or extension of the lease under section 44 (1) (a), the offer has not been accepted and (not earlier than one month after the offer was made) the lessor by written notice informs the lessee that negotiations are concluded without result, or
  - (b) the lessor by written notice informs the lessee that the lessor does not propose to offer the lessee a renewal or extension of the lease and there are no arrangements to allow the lessee to remain in possession of the shop, or
  - (c) the lessee by written notice informs the lessor that the lessee does not wish to enter into negotiations for the renewal or extension of the lease or that the lessee wishes to withdraw from the negotiations, or
  - (d) the lessee has vacated or agrees in writing to vacate the shop, or
  - (e) the lessee consents in writing to publication of the advertisement.

Maximum penalty: 50 penalty units.
- (2) This section does not affect the industry practice of testing the market, otherwise than by written or broadcast advertisement, in connection with the leasing of a retail shop.
- (3) This section does not apply to a lease of community land within the meaning of the *Local Government Act 1993*.

**[53] Section 45 Key-money and lease preparation expenses for renewal or extension prohibited**

Omit “bond or security deposit” from section 45 (3) (c).

Insert instead “security bond or other bond”.

**[54] Section 47 Security deposits**

Omit the section.

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**[55] Section 54 Six-monthly advertising and promotion expenditure statement to be made available to lessees**

Insert “relating exclusively to the building or centre in which the retail shop is located” after “expenditure” in section 54 (a).

**[56] Section 54 (2)**

Insert at the end of section 54:

- (2) The details to be provided in a statement made available under this section in relation to an accounting period must also include:
  - (a) in respect of expenditure by the lessor on account of advertising and promotion costs of the lessor:
    - (i) a statement of the amount contributed by the lessor in respect of expenditure relating exclusively to the building or centre, and
    - (ii) a statement of the total of the amounts contributed by the lessees, and
  - (b) in respect of contributions by the lessor on account of advertising and promotion costs of the lessor relating exclusively to the building or centre and in respect of contributions by the lessees on account of advertising and promotion costs of the lessor:
    - (i) a statement of the total unspent amount carried forward to that period, and
    - (ii) a statement of the total unspent amount to be carried forward to the next period, and
  - (c) any other statements prescribed by the regulations.

**[57] Section 55 Annual advertising and promotion expenditure statement to be given to lessees**

Insert “relating exclusively to the building or centre in which the retail shop is located” after “expenditure” in section 55 (a).

**[58] Section 55 (2)–(4)**

Insert at the end of the section:

- (2) The details to be provided in an advertising statement given to a lessee under this section in relation to an accounting period must also include:
  - (a) in respect of expenditure by the lessor on account of advertising and promotion costs of the lessor:

- (i) a statement of the amount contributed by the lessor in respect of expenditure relating exclusively to the building or centre, and
  - (ii) a statement of the total amount contributed by the lessee, and
- (b) in respect of contributions by the lessor on account of advertising and promotion costs of the lessor relating exclusively to the building or centre and in respect of contributions by the lessee on account of advertising and promotion costs of the lessor:
  - (i) a statement of the total unspent amount carried forward to that accounting period, and
  - (ii) a statement of the total unspent amount to be carried forward to the next accounting period, and
- (c) any other statements prescribed by the regulations.
- (3) An auditor preparing a report under subsection (1) (d) or the lessor must ensure that the lessee is given a reasonable opportunity to make a written submission to the auditor on the accuracy of the lessor's proposed advertising statement. The auditor need not contact the lessee for the purposes of this subsection if the lessor advises the auditor that the lessor has informed the lessee of the lessee's opportunity under this subsection.
- (4) The auditor must consider any written submissions made pursuant to subsection (3).

**[59] Section 55A**

Insert after section 55:

**55A Non-provision of marketing plan or advertising and promotion statement**

- (1) A lessee is entitled to withhold payment of contributions in respect of advertising or promotion costs of the lessor if:
  - (a) the lessor has failed:
    - (i) to make available to the lessee a marketing plan required under section 53 (a), or
    - (ii) to make available to the lessee details of proposed expenditure on an opening promotion as required under section 53 (b), or
    - (iii) to make available to the lessee a written statement of expenditure required under section 54, or

- 
- (iv) to give the lessee an advertising statement required under section 55, and
  - (b) the lessee has, at or after the expiry of the time when the plan, details or statement was required to be made available to or given to the lessee, requested the lessor in writing to furnish the plan, details or statement to the lessee, and
  - (c) the lessor's failure has continued for 10 business days after the request was made.
- (2) The lessee must pay the withheld contributions within 28 days after the lessor furnishes the plan, details or statement.
  - (3) The lessor is not entitled to recover interest or late payment charges in respect of contributions withheld in accordance with this section.
  - (4) The lessee is not in breach of the retail shop lease for acting in accordance with this section.
  - (5) This section does not affect any other rights that the lessee has in connection with the lessor's failure to provide the plan, details or statement.

**[60] Part 7A, and Division 1, headings**

Omit the heading to Part 7A. Insert instead:

**Part 7A Unconscionable conduct and misleading or deceptive conduct**

**Division 1 Unconscionable conduct**

**[61] Section 62A Application of Division**

Omit "Part" wherever occurring. Insert instead "Division".

**[62] Section 62A (3)**

Insert at the end of section 62A:

- (3) Nothing in this Division affects the operation of Division 2.

**[63] Section 62B Unconscionable conduct in retail shop lease transactions**

Insert after section 62B (9):

- (10) In this section:  
*lessee* or *former lessee* includes a person who is a guarantor or covenantor under a lease or former lease.

**[64] Part 7A, Division 2**

Insert after section 62B:

**Division 2 Misleading or deceptive conduct**

**62C Interpretation and application of Division**

- (1) In this Division:  
*misleading or deceptive conduct* means conduct to which section 62D applies.  
*party or former party* to a retail shop lease or former retail shop lease includes a person who is a guarantor or covenantor under a lease or former lease.
- (2) Nothing in this Division affects the operation of Division 1.

**62D Misleading or deceptive conduct in connection with retail leases**

A party to a retail shop lease must not, in connection with the lease, engage in conduct that it is misleading or deceptive to another party to the lease or that it is likely to mislead or deceive another party to the lease.

**62E Right to compensation**

A party or former party to a retail shop lease who suffers loss or damage by reason of misleading or deceptive conduct of another party may recover the amount of the loss or damage by lodging a claim against the other party under section 71.

**[65] Section 63 Interpretation**

Insert “, and (without limiting the generality of the foregoing) includes a dispute about a security bond” after “relates” in the definition of *retail tenancy dispute* in section 63 (1).

**[66] Section 63 (1), definition of “Tribunal”**

Omit the definition.

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**[67] Section 70 Definitions**

Omit paragraph (a) (i) of the definition of *retail tenancy claim*. Insert instead:

- (i) a claim for payment of money (whether or not stated to be by way of debt, damages, restitution or refund),

**[68] Section 70, definition of “retail tenancy claim”**

Omit paragraph (a) (x). Insert instead:

- (x) without limiting the generality of subparagraph (i), a claim for compensation under section 10, 34, 35 or 62E,
- (xi) without limiting the generality of any other subparagraph, a claim with respect to the entitlement of a party or former party under a lease to receive payment of the whole or a part of a security bond,

**[69] Section 70, definition of “retail tenancy claim”**

Omit paragraphs (b) and (c). Insert instead:

- (b) an application for the appointment by the Tribunal of a specialist retail valuer under section 19 or 31,
- (c) an application for the appointment by the Tribunal of two specialist retail valuers under section 32A,
- (d) an application under section 19 (3) or 31 (3), or under those provisions as applied by section 32A, by a specialist retail valuer,
- (e) a claim against a specialist retail valuer under section 19A (3) or 31A (3), or under those provisions as applied by section 32A, for compensation for loss or damage suffered as a consequence of the use or communication or divulging of information.

**[70] Section 71A Lodging of unconscionable conduct claims with Tribunal**

Omit section 71A (3). Insert instead:

- (3) In this section:  
*lessor* or *lessee* under a retail shop lease or former retail shop lease includes a person who is a guarantor or covenantor under a lease or former lease.



**[71] Section 71B**

Insert after section 71A:

**71B Lodging of claims after 3 years**

- (1) A retail tenancy claim may be lodged more than 3 years but no later than 6 years after the liability or obligation that is the subject of the claim arose, if the Tribunal orders that the claim may be lodged with the Tribunal.
- (2) An unconscionable conduct claim may be lodged more than 3 years but no later than 6 years after the alleged unconscionable conduct occurred, if the Tribunal orders that the claim may be lodged with the Tribunal.
- (3) The Tribunal may make an order under this section:
  - (a) on application by the party or former party concerned, and
  - (b) after hearing such of the persons likely to be affected by the application as it sees fit, and
  - (c) if the applicant satisfies the Tribunal that it is just and reasonable to make the order.

**[72] Section 72 Powers of Tribunal relating to retail tenancy claims**

Insert at the end of section 72 (1) (f) (iii):

or

- (iv) declaring that a party is or is not entitled to receive payment of the whole or a part of a security bond,

**[73] Section 72AB**

Insert after section 72AA:

**72AB Powers of Tribunal relating to appointment of specialist retail valuers**

- (1) The Tribunal may appoint:
  - (a) a specialist retail valuer, on application under section 19 or 31, or
  - (b) two specialist retail valuers, on application under section 32A.
- (2) The appointment of a specialist retail valuer is to be made from separate lists of nominees prepared separately by the persons for the time being holding or acting in the offices of President of the Australian Property Institute (NSW) and President of the Real Estate Institute (NSW).

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- (3) The parties to the lease concerned are to pay the costs of the application to the Tribunal in equal shares.
  - (4) The Tribunal may attach such conditions as it considers appropriate to the appointment of a specialist retail valuer, including conditions about the fees that may be charged by the valuer in connection with valuations under this Act.
  - (5) No matter or thing done or omitted to be done by a specialist retail valuer appointed by the Tribunal subjects the valuer to any action, liability, claim or demand if the matter or thing was done in good faith for the purposes of a determination of rent by valuation carried out by a specialist retail valuer under section 19, 31 or 32A.

**[74] Section 73 Monetary limit on Tribunal's jurisdiction**

Omit "\$300,000". Insert instead "\$400,000".

**[75] Section 73**

Insert ", whether on a balance of account or after set-off or otherwise" after "regulations".

**[76] Section 73 (2) and (3)**

Insert at the end of the section:

- (2) The amount for the time being applicable under subsection (1) may be increased by regulation not more frequently than once each 3 years (disregarding any disallowed regulation or provision of a regulation).
- (3) The amount resulting from an increase by regulation must not exceed the base amount, adjusted in line with movements in the Consumer Price Index (All Groups Index) for Sydney and rounded up to the nearest \$10,000. The base amount is the dollar amount for the time being specified in subsection (1), unaffected by any regulation under that subsection.

**[77] Section 76A Removal of proceedings to Supreme Court**

Insert ", or partly for an unconscionable conduct claim and partly for a retail tenancy claim," after "unconscionable conduct claim" in section 76A (1).

**[78] Section 76A (3)**

Omit "for an unconscionable conduct claim".

**[79] Section 76A (3)**

Insert “or retail tenancy claim, as the case requires” after “claim” where lastly occurring.

**[80] Section 77 Appeals**

Omit “(other than a party to proceedings for an unconscionable conduct claim)” from section 77 (1).

**[81] Section 77 (2)–(7)**

Omit the subsections.

**[82] Section 80B Non-retail premises exempted**

Omit “business specified in Schedule 1” from section 80B (1) (a).  
Insert instead “listed business”.

**[83] Section 80D Further entitlement to withhold consent to assignment**

Omit the heading. Insert instead “**Exemption from section 34**”.

**[84] Section 81A**

Insert after section 81:

**81A Service of documents and notices**

- (1) Any document or notice that must or may be served or given under or for the purposes of this Act must be in writing, and is sufficiently served or given:
  - (a) if delivered personally, or
  - (b) if left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served, or
  - (c) in the case of a mortgagor in possession, if left at or sent by post to any occupied house or building comprised in the mortgage, or
  - (d) if delivered to the facilities of a document exchange of which the person on whom it is to be served is a member, or
  - (e) where relevant, if served or given in such manner as a court or tribunal may direct, or
  - (f) if served or given in accordance with the terms of the retail shop lease concerned, or
  - (g) if served or given in accordance with the regulations.

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- (2) In the case of service by delivery to the facilities of a document exchange, the notice is, unless the contrary is proved, taken to have been served on the second business day following the day of delivery of the notice to those facilities.

**[85] Section 82 Exemptions from Act**

Omit “or retail shop”. Insert instead “, retail shop or security bond”.

**[86] Section 82**

Omit “or retail shops”. Insert instead “, retail shops or security bonds”.

**[87] Sections 82A and 82B**

Insert after section 82:

**82A Rail Corporation New South Wales**

For the purposes of section 34, Rail Corporation New South Wales as lessor of a retail shop is taken not to have engaged in any of the activities described in section 34 (1) (a)–(f) because of anything done or omitted to be done by the lessor wholly or predominantly for any one or more of the following purposes:

- (a) railway safety,
- (b) railway station safety,
- (c) railway security,
- (d) railway station security,
- (e) satisfying regulatory requirements.

**82B Delegation by Director-General**

- (1) The Director-General may delegate any functions of the Director-General under this Act (other than this power of delegation) to:
  - (a) a member of the staff of the Department of State and Regional Development, or
  - (b) an authorised officer under Part 2A, or
  - (c) a person holding a position, or a person of a class, prescribed by the regulations.
- (2) A delegate may sub-delegate to a person referred to in subsection (1) any delegated function if the delegate is authorised in writing to do so by the Director-General.

**[88] Sections 84B and 84C**

Insert after section 84A:

**84B Transitional provisions regarding alteration of list of businesses: existing leases**

- (1) In this section:  
*legislative amendment* means:
  - (a) an amendment to or the substitution of Schedule 1, or
  - (b) the making, amendment or substitution of a regulation.
- (2) If premises become a retail shop within the meaning of this Act because of a legislative amendment, this Act does not apply to:
  - (a) a lease of the premises entered into before the date of the amendment, or
  - (b) a lease of the premises entered into under an option granted or agreement made before that date,except in so far as the regulations otherwise provide.
- (3) If premises cease to be a retail shop within the meaning of this Act because of a legislative amendment, this Act continues to apply to:
  - (a) a lease of the premises entered into before the date of the amendment, and
  - (b) a lease of the premises entered into under an option granted or agreement made before that date,except in so far as the regulations otherwise provide.
- (4) If:
  - (a) one or more premises in a cluster of premises cease to be a retail shop or retail shops within the meaning of this Act because of a legislative amendment, and
  - (b) the cluster ceases as a result to be a retail shopping centre within the meaning of this Act,this Act continues to apply to a lease of other premises in the cluster entered into before the date of the amendment, except in so far as the regulations otherwise provide.

**84C Transitional provisions regarding additions to list of businesses: shopping centres**

- (1) The purpose of this section is to provide that a cluster of premises does not become a retail shopping centre just because a legislative amendment has the effect of making the business

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carried on in one or more of existing leased premises a listed business. This exemption ceases to apply when the existing lease expires.

- (2) In this section:  
*exempted lease* means a lease referred to in section 84B (2) (a) that is exempt from this Act by section 84B (2).

*legislative amendment* means:

- (a) an amendment to or the substitution of Schedule 1, or
- (b) the making, amendment or substitution of a regulation.

- (3) If:
- (a) one or more businesses become listed businesses because of a legislative amendment, and
  - (b) one or more of the premises in a cluster of premises were, immediately before the date of the amendment, used wholly or predominantly for the carrying on of one or more of those businesses (and not for the carrying on of one or more of listed businesses specified immediately before that date),

the premises referred to in paragraph (b) are to be disregarded for the purpose of determining whether or not the cluster is a retail shopping centre within the meaning of this Act while they are the subject of an exempted lease.

**[89] Section 85 Regulations**

Insert at the end of the section:

- (2) In particular, the regulations may make provision for or with respect to:
- (a) the qualifications, appointment and functions of specialist retail valuers, and
  - (b) the preparation, format and general content of the lists of nominated specialist retail valuers, and the times or intervals at which the lists are to be provided, and
  - (c) the construction of a reference in a provision of this Act to an organisation or office that no longer exists.

**[90] Schedule 1**

Omit the Schedule. Insert instead:

**Schedule 1      Retail shop businesses**

(Section 3)

Adult books and toy shops  
Aged care product shops  
Amusement and entertainment services  
Antique shops  
Art galleries  
Art supplies shops  
Arts and crafts shops  
Baby supplies shops  
Bakeries or bread shops  
Balloon shops  
Bar accessories shops  
Barbecue equipment shops  
Barbers  
Batteries shops (other than motor vehicle batteries)  
Beach wear shops  
Beauticians  
Beauty shops  
Beauty therapists  
Beer, wine and spirit shops (except where goods are for consumption on the premises)  
Bicycle accessories shops  
Bicycle shops  
Biscuit bar shops  
Bookshops  
Boot and shoe repairers

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Bridal wear sales and hire shops  
Building supplies shops  
Business machines and equipment shops  
Butcher shops  
Cake shops  
Camping equipment shops  
Candle shops  
Cards shops  
Carpet shops  
Chandler shops  
Cigarette shops  
Clock shops  
Coffee, tea and other non-alcoholic beverage shops  
Coins and coin collections shops  
Comic shops  
Confectionery shops  
Convenience food shops  
Cookie shops  
Cosmetics shops  
Costumes and formal wear hire shops  
Curtain shops  
Delicatessen shops  
Department stores  
Dinnerware shops  
Disposals shops  
Drapery shops  
Dry cleaners, collection centres for dry cleaning or laundry services  
Duty free shops  
Electrical appliance shops  
Electronic equipment and supplies shops



Retail Leases Amendment Bill 2005

Schedule 1      Amendment of Retail Leases Act 1994

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Engravers  
Equestrian wear shops  
Equipment hire shops  
Fairy shops  
Fast food shops  
Fast-photo processors  
Firearms shops  
Flag shops  
Floor covering shops  
Florist shops  
Flower shops or allied goods and services  
Fruit and vegetable shops  
Fruit juice shops  
Funerary goods shops (incense, joss sticks)  
Furniture shops  
Games and hobbies shops  
General stores  
Gift shops  
Gift-wrapping shops  
Golf equipment shops  
Greengrocer shops  
Grocery shops  
Haberdashery shops  
Hairdressers  
Hardware shops  
Health food shops  
Hearing aid shops  
Hot water system shops  
Household appliance and house appliance repairs shops  
Household fixtures and fittings shops

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Ice cream shops  
Interior decoration shops  
Internet cafes  
Jewellery shops  
Key cutting shops  
Kitchenware shops  
Knick-knack shops and novelties shops  
Leather goods shops  
Lighting shops  
Linen shops  
Lingerie shops  
Lottery agencies  
Manchester shops  
Map shops  
Martial arts supplies shops  
Mixed business shops  
Motor vehicle and motor cycle accessories shops (excluding tyre shops and batteries shops)  
Music or musical equipment shops  
Nail bars  
Newsagency shops  
Nut bar shops  
Office equipment shops  
Optical goods or services shops  
Optometrists  
Organ shops  
Paint and paper shops  
Party shops  
Patisserie or pastry shops  
Pawnbroking shops

Retail Leases Amendment Bill 2005

Schedule 1      Amendment of Retail Leases Act 1994

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Perfume shops  
Pet shops, pet grooming and supplies shops and aquarium shops  
Pharmacy shops  
Photocopy shops  
Photographic equipment and supplies shops  
Picture frames shops  
Plumbing supplies shops  
Pools and spas shops  
Poultry shops (fresh, frozen, cooked)  
Precious stones shops  
Prints and posters shops  
Religious goods shops  
Restaurants, cafeterias, coffee lounges, food courts and other eating places  
Retail post offices  
Rubber stamp supply shops  
Seafood shops  
Second-hand goods shops  
Sewing machine shops (sewing materials, needlepoint and craft-related items)  
Shoe and boot repair shops  
Shoe shops  
Shops selling or engaged in providing any one or more of the following goods or services in relation to any person: accessories, baby wear, bags, caps, clothing, clothing alterations, underwear or sunshades  
Shops selling or renting any one or more of the following goods: cassettes, musical instruments, pre-recorded tapes, records, video tape and pre-recorded music libraries downloading, CDs, DVDs or other like products  
Shops selling or renting any one or more of the following goods: telecommunication (mobile phones or services), televisions, videos, home entertainment systems, software, electronic games, computers or computer products or household appliances  
Silverware shops  
Sleepwear shops

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Smallgoods shops  
Snack bars  
Soft drink shops  
Soft furnishing shops  
Souvenir, trophy and memorabilia shops  
Specialised food shops  
Sporting goods shops  
Stamps and stamp collection shops (whether for purchase or sale or both)  
Stationery shops  
Supermarkets  
Surfboard shops  
Surfing accessories shops  
Takeaway food shops  
Tobacconist shops  
Toy and game repair shops  
Toy shops  
Travel agency or travel services  
Umbrella shops  
Underwear shops  
Variety stores  
Vitamin shops  
Wall decorations shops  
Watch shops  
Water filter shops  
Wig shops  
Writing materials shops  
Any other business as from time to time may be prescribed by the regulations.

**[91] Schedules 2 and 2A**

Omit the Schedules. Insert instead:

**Schedule 2 Lessor and lessee disclosure statements**

(Sections 11 and 11A)

**Part 1 Lessor's disclosure statement**

**Advice to lessees**

- 1 Before signing agreements to a lease or leases, lessees should ensure they fully understand the documents.
- 2 If there is any doubt, lessees should seek independent legal advice.

**Note.** If there is insufficient space on this form please attach additional sheets and appropriate documents.

**Shop and lease details**

Address of shop/shop No:

Permitted use of shop:

Lease period (see note 1): *[date]* to *[date]*

Lettable area (sq m) (see note 2):

Options to renew:  No  Yes

Option periods: *[date]* to *[date]*

Lessor's requirements as to quality and standard of fittings in shop (see note 3).

Finishes, fixtures, fittings, equipment and services to be provided by the lessor.

Lessee has to pay for the finishes, fixtures, fittings, equipment and services to be provided by the lessor:  No  Yes

If yes, to what extent:

Finishes, fixtures, fittings, equipment and services to be provided by the lessee.

Hours of access to shop outside trading hours:

Date on which shop will be available for occupation by the lessee:

Rent:

Method or formula for calculating rent:

Commencement date: *[date]*

Rent reviews:

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Frequency:

Nature:

Details of any current legal proceedings in relation to the lawful use of the premises/centre:

**Outgoings to be paid by the lessee**

**Details of outgoings**

**Estimate p.a.**

**Services to the public**

Car parking

Child minding

Public address/music

Security

Signs

Telephones (public)

Uniforms

**Administration costs**

Audit fees

Management fees (administration cost to run centre)

Management fees (paid to management company)

**Waste management costs**

Sewage disposal and sullage

Waste disposal and removal maintenance

**Costs to run centre**

Air conditioning/ventilation

Building intelligence and emergency systems

Cleaning (consumables)

Cleaning (other)

Electricity

Energy management systems

Fire protection

Gardening

Gas and oil

Insurance

Lifts and escalators

Pest control  
Repairs and maintenance  
Sinking fund for repairs and maintenance  
Strata levies

**Government charges**

Land tax  
Local government rates and charges  
Water, sewerage and drainage rates and charges

**Others (specify)**

TOTAL

Formula for apportionment of outgoings if the lessee is not liable for the total amount:

Additional outgoings to be borne by lessee

**Details as to interest of lessor**

Is the lessor:

Owner of the shop or  Lessee of the shop

Give details of any rights and obligations of lessor under that lease that may affect the shop:

**Details as to agreements or representations**

Give details of any other agreements between lessor and lessee, or representations made by lessor or lessee including those relating to exclusivity or limitations on competing uses:

**Details of any anticipated disturbance to trading**

Give details of any disturbance likely to occur during the term of the lease, where known, where this will have a significant adverse effect on trading:

Section 34 (3) of the *Retail Leases Act 1994* may limit a lessee's claim for compensation if an event disturbing a lessee's trade was brought to the attention of the lessee in writing, before the lease was entered into. A general written statement made to the lessee before the lease is entered into will not be enough to limit liability of the lessor. A statement must specifically describe the nature of the disturbance, include an assessment of the likelihood of the disturbance taking place (including an indication of the basis on which the assessment was reached) and have regard to its timing, duration and effect during the lease term. Lessees should have to be aware that it is not always possible to predict the timing and the duration of disturbances with certainty.

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**Retail shopping centre details**

Name of retail shopping centre:

Address of retail shopping centre:

[*Suburb/Town*] [*Postcode*]

Number of retail shops in retail shopping centre:

Gross lettable area (sq m):

Parking facilities at retail shopping centre:

Number of bays available for customers:

Number of bays reserved for lessee:

Facilities and services provided by the lessor:

Annual turnover of the retail shopping centre (to the extent collected by the lessor) for the previous accounting period (see note 4):

Annual turnover for specialty shops, on a per square metre basis, for the previous accounting period. Minimum aggregation is to be on the basis of three types of categories (to the extent collected by the lessor) (see note 5):

food

non-food

services

Expiry date [*month/year*] of the leases of retailers with a lettable area more than 1,000 square metres:

Total centre traffic count (where available) for the previous accounting period:

Cost of (or basis or formula for) lessor's works to prepare premises for fit-out (see note 6):

Changes or developments planned by the lessor for:

Retail shopping centre  No  Yes Attach details

Surrounding roads  No  Yes Attach details

Core trading hours (the times when retail shops in the shopping centre are required to be open for business):

Tenant mix (attach floor plan showing existing and proposed tenancy mix of the precinct and the location of common areas and kiosks within the precinct).

This arrangement applies as at the date of this statement but may be changed from time to time, subject to agreements or representations details of which are given in this disclosure statement.

Is the lessor able to assure the lessee that the current tenant mix as shown on the attached floor plan will not be altered through the introduction of a competitor or any other type of tenant  No  Yes

Tenant/Merchant Association  No  Yes

Attach details of constitution, voting rights, contributions



Contribution to retail shopping centre advertising and promotion

No  Yes

Lessee's contribution \$ \_\_\_\_\_ per annum

**Note 1.** Section 16 of the *Retail Leases Act 1994* provides for a minimum term of 5 years for a retail shop lease. The 5 year term can be made up of an initial term and any combination of options. If the parties to the lease agree to a term of less than 5 years, the lessee must provide the lessor with a certificate from the lessee's solicitor or conveyancer indicating that:

- (a) the lessee's rights under section 16 have been explained to them, and
- (b) the lessee has made an informed decision to accept a term of less than 5 years.

Making an informed decision about the viability of a retail business with a less than 5 year term should form part of the lease negotiation. A pro forma section 16 certificate is available for download from [www.retailtenancy.nsw.gov.au](http://www.retailtenancy.nsw.gov.au). It can be provided to the lessor within 6 months of entering into the lease. Without a section 16 certificate, the lessee has the choice of extending the term of the lease to 5 years.

**Note 2.** Required only for shops in shopping centres or if the rent and/or outgoings is calculated on a "per square metre basis".

**Note 3.** If the lessor requires a particular standard of construction for fit-out, the lessee is to be provided with a fit-out guide, setting out this information, with this disclosure statement.

**Note 4.** The lessor is not liable for a claim under Division 2 of Part 7A of the Act for misrepresentation for any error in the annual turnover of the retail shopping centre if the error is the result of inaccurate information provided to the lessor by the lessee(s).

**Note 5.** This breakdown is not to identify an individual lessee. For example, if there are only one or two food lessees in a centre, the food category would be excluded from disclosure, or incorporated in non-food or services and noted. The lessor is not liable for a claim of misrepresentation under Division 2 of Part 7A of the Act for any error if this error is the result of inaccurate information provided to the lessor by the lessee(s).

**Note 6.** Lessor's works are the works which must be done by the lessor's trade contractors or employees prior to the commencement of the fit-out by the lessee. The cost of lessor's works is to be agreed before works are carried out and if actual cost exceeds the agreed cost, the lessee is not liable to bear the difference.

## Appendix to Part 1 of Schedule 2

### Information for the lessee to consider when entering into a retail shop lease

Before signing a lease:

You should have detailed discussions with the lessor/agent and also seek advice from business associations, your solicitor and your accountant. Also consult your local Council about any regulations, permitted use or development applications affecting the shop.

Information on these topics is included in the retail tenancy guide.

Ensure that all agreements arrived at with the lessor are included in the lease. Documentation is critical to avoiding and managing disputes about the lease.

**Rent—be clear about the following issues:**

What the starting rent is, and on what basis it is calculated.

How the rent will increase during the lease.

If you have agreed to pay turnover rent, be clear as to how you will give this information to the lessor.

If there is an option as part of the lease, find the clauses of the lease that tell you how and when you must exercise the option and that explain how the rent will be set.

**Lease establishment—check:**

That you have read the lease and asked for advice on what it means.

That the description of the premises in the lease is accurate and covers any rights you will have to use common areas or car parking for you, your staff or visitors.

Whether statements you have relied on in agreeing to the lease have been documented in the Lessee's Disclosure Statement, so as to avoid disagreements later.

Whether you need to provide a security bond or personal guarantee to secure the lease, and how much this will be. If a cash security bond is agreed to, be sure it is lodged under the NSW Government's retail bond scheme.

What expenses you will have to meet to fit-out the shop ready for trading, and whether you will have to meet any of the costs incurred by the lessor in preparing the shop for you to occupy it.

**The premises—you will need to be sure that:**

The location and building suit the proposed use you will make of the leased premises and to check whether you will have to renovate to enable the shop to operate.

The hours you can access the shop and open it to trade, as allowed by the lessor and the Council, will be sufficient to allow you to trade profitably.

You have, or can readily obtain, all the permits and licences required to operate the type of business you have chosen, and that the Council's zoning for the premises does not restrict you from operating this type of business.

You have a condition report or photos to document the state of the premises when taking possession, to prevent or address disputes at the end of the lease. Agreements about equipment should also be documented.

**Outgoings and expenses—you need to understand:**

The extra expenses you will have to meet as outgoings, and how they may change over the term of the lease. These are set out in the Lessor's Disclosure Statement.

The information that the lessor will provide and your rights to receive estimates to allow you to plan for these expenses.

The insurance costs you will have to meet, including any contribution to the lessor's insurance.

### **When you want to sell the business**

If you want to sell your business, you need to be aware of the process set out in the *Retail Leases Act 1994* for assigning the lease. The lessee becomes the assignor of the lease, and the potential new lessee becomes the assignee. In brief, these are the steps:

- 1      Get an updated copy of the lessor's disclosure statement. If an updated disclosure statement has not been issued during the term of your lease, request one in writing from the lessor. If it is not provided within 14 days, provide the latest version of the disclosure statement you have to the assignee (or if none exists, this requirement does not apply to you).
- 2      Give a copy of the assignor's disclosure statement to the assignee (and to the lessor at least 7 clear days before the assignment if you want to be protected from on-going liability under the lease).
- 3      Gather, from the assignee, the following information to provide to the lessor:
  - (a)    The assignee's name and contact details.
  - (b)    Documentation to indicate the assignee's financial standing.
  - (c)    Business experience of the assignee.
  - (d)    Written records of statements made by the assignor or lessor which influenced the assignee in deciding to enter the assignment.
- 4      Provide information in point 3 to the lessor in writing, by:
  - (a)    delivering it personally, or
  - (b)    leaving it at or posting it to the last known residential or business address of the lessor,or in any other manner referred to in section 81A of the Act.
- 5      The lessor must respond to the request for assignment of the lease within 28 days from the time all the required information is received, or the assignment is deemed to have taken place.
- 6      The reasons the lessor can refuse a request for assignment of a lease are:
  - (a)    If the use of the premises is to change.
  - (b)    If the assignee (new lessee) has inadequate retail skills compared to the assignor (current lessee).
  - (c)    If the assignee has inferior financial resources to the proposed assignor.

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- (d) If the lessee has not complied with the procedure for obtaining consent to the assignment, as set out in section 41 of the Act.
  - (e) If the shop is in airside premises at Sydney (Kingsford-Smith) Airport and the lessor exercises the right to withhold consent to the assignment under section 80E of the Act.

### **General**

Check with your accountant the most tax effective way to structure the payment of rent, fit-out costs and GST.

Make sure that all negotiated agreements are written into the lease.

Inspect the property and take notes and photographs prior to moving in.

Section 11A of the *Retail Leases Act 1994* requires a lessee's disclosure statement to be provided to the lessor within 7 days (or any agreed further period) of the lessee receiving the lessor's disclosure statement. The lessee may be liable to a penalty for an offence under that Act if the lessee's disclosure statement is not provided.

## **Part 2 Lessee's disclosure statement**

### **Advice to the lessor**

- 1 The lessee acknowledges that the attached Part 1, Lessor's Disclosure Statement, was received from the lessor prior to entering into the lease.
- 2 The lessor has made available to the lessee a copy of the proposed retail shop lease and a copy of a retail tenancy guide as prescribed by or identified in the regulations.
- 3 The lessee has sought/not sought independent advice in respect of the commercial terms contained in the Lessor's Disclosure Statement and the obligations contained in the proposed retail shop lease.
- 4 The lessee believes that the lessee will be able to fulfil the obligations contained in the lease, including the payment of the proposed rent, outgoings and other amounts, based on the lessee's own business projections for the business.
- 5 In entering into the retail shop lease, the lessee has relied on the following statements or representations made by the lessor or the lessor's agents:  
**Note.** Matters such as agreements or representations relating to exclusivity or limitations on competing uses, sales or customer traffic should be detailed.
- 6 Apart from the statements or representations set out above, no other promises, representations, warranties or undertakings (other than those contained in the lease) have been made by the lessor to the lessee in respect of the premises or the business to be carried out on the premises.

Should more space be required please detail on another page.

Signed by or for and on behalf of the lessee:

Date:

## **Schedule 2A    Assignor's disclosure statement**

(Section 41)

This statement is to be provided to the lessor when a lessee is requesting the lessor to agree to the assignment of a lease. In these circumstances the lessee is the assignor and the proposed new lessee is the assignee. The purpose of the form is to assure the lessor that the assignee has been made aware of the information specified as necessary for the assignment process, as set out in section 41 of the *Retail Leases Act 1994*. The lessor may take up to 28 days to consent to, or reject, the assignment of the lease, once the lessor receives all the information referred to in this disclosure statement. If the lessor does not respond in this period, the assignment is deemed to have been consented to.

The assignor certifies and the assignee acknowledges that:

- (a) 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.
- (b) The assignee has been advised that there are no outstanding notices in respect of the lease.
- (c) The assignee has been advised that there are no outstanding notices from any authority in respect of the retail shop.
- (d) The assignee has been advised that there are/are not any encumbrances on the lease.
- (e) The assignee has been advised that there are/are not any encumbrances on, or outside ownership of, any of the fixtures and fittings within the retail shop.
- (f) The lessor has/has not conferred any rent concessions or other benefits on the assignor during the term of the lease. The concessions and benefits conferred on the assignor are:
- (g) The assignor has provided to the assignee sales figures and relevant information as to the trading performance of the retail shop for the past three years or for such period as the lease has been in operation if that period is less than three years. The total (aggregate) sales figure for the past 3 years, or such lesser period as the lease has been in operation, is as follows:
  - (i) (period/year)      \$
  - (ii) (period/year)      \$

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(iii) (period/year) \$

**Note 1.** This information is to be given to the lessor in writing, by:

- (a) delivering it personally, or
- (b) leaving it at or posting it to the last known residential or business address of the lessor,

or in any other manner referred to in section 81A of the Act.

**Note 2.** Further information to be provided to the lessor about the assignee by the assignor in seeking consent to assignment is:

- (a) details of the assignee
- (b) documentation showing the financial standing of the assignee
- (c) business experience of the assignee
- (d) written statements of things said by the assignor or lessee which influenced the assignee to enter the assignment

I certify that I have provided the information set out in paragraphs (a)–(g) to the assignee.

Assignor:

Date:

I acknowledge receipt of the information as set out in paragraphs (a)–(g).

Assignee:

Date:

**[92] Schedule 3 Savings and transitional provisions**

Insert at the end of clause 1 (1):

*Retail Leases Amendment Act 2005*

**[93] Schedule 3, Part 6**

Insert after Part 5:

**Part 6 Retail Leases Amendment Act 2005**

**16 Meaning of “2005 Amending Act”**

In this Part:

*2005 Amending Act* means the *Retail Leases Amendment Act 2005*.

**17 Prescribed businesses for definition of “retail shop”—section 3 and Schedule 1**

- (1) Until regulations are made for the purposes of paragraph (a) of the definition of *retail shop* in section 3 and Schedule 1 is repealed by regulations under subclause (2):

- (a) the businesses specified in Schedule 1 are taken to be prescribed for the purposes of paragraph (a) of that definition, and
  - (b) the regulations may amend Schedule 1.
- (2) Regulations made for the purposes of paragraph (a) of that definition may repeal Schedule 1.

**18 Application of Act to short-term leases—section 6A**

- (1) Section 6A (1) as inserted by the 2005 Amending Act extends to retail shop leases entered into before the commencement of section 6A.
- (2) Section 6A (2) as inserted by the 2005 Amending Act applies to retail shop leases entered into after the commencement of section 6A, but does not apply to or in respect of retail shop leases entered into before that commencement.
- (3) For the avoidance of doubt, section 6A (2) applies to a retail shop lease entered into after the commencement of section 6A by way of renewal of a retail shop lease entered into before that commencement, as referred to in section 80.

**19 Amended disclosure statements—sections 11, 11A and 41 and Schedules 2 and 2A**

- (1) The lessor's disclosure statement given or to be given on or before the relevant day by a prospective lessor (including the form of lessee's disclosure statement required to be attached) may be given as if Schedule 2 had not been substituted by the 2005 Amending Act, unless the lessor elects to use the substituted forms set out in Parts 1 and 2 of that Schedule.
- (2) The *relevant day* is the last day of the period of 6 months commencing on the date of the substitution of Schedule 2 by the 2005 Amending Act.
- (3) The lessee's disclosure statement to be given by a prospective lessee in response to a lessor's disclosure statement referred to in subclause (1) is to be given in the form in which it was provided by the lessor.
- (4) An assignor's disclosure statement provided, in relation to a proposed assignment of a retail shop lease, in the form set out in Schedule 2A before the substitution of Schedule 2A by the 2005 Amending Act may continue to be used in relation to that assignment on or after the date of the substitution.

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**20 Prescribed forms of disclosure statements—sections 11, 11A and 41 and Schedules 2 and 2A**

- (1) Until regulations are made prescribing forms for the purposes of sections 11 and 11A and Schedule 2 is repealed:
  - (a) the form set out in Part 1 of Schedule 2 is taken to be prescribed for the purposes of section 11, and
  - (b) the form set out in Part 2 of Schedule 2 is taken to be prescribed for the purposes of section 11A, and
  - (c) the regulations may amend Schedule 2.
- (2) Until regulations are made prescribing a form for the purposes of section 41 and Schedule 2A is repealed:
  - (a) the form set out in Schedule 2A is taken to be prescribed for the purposes of section 41, and
  - (b) the regulations may amend Schedule 2A.
- (3) Regulations made for the purposes of sections 11 and 11A may repeal Schedule 2.
- (4) Regulations made for the purposes of section 41 may repeal Schedule 2A.

**21 Costs before fit-out—section 13**

Section 13 as inserted by the 2005 Amending Act does not apply to leases entered into before the commencement of that section.

**22 Minimum 5 year term—section 16**

Section 16 as amended by the 2005 Amending Act extends to leases in force at the commencement of the amendments made to that section.

**23 Interest payable on security bonds—section 16M**

Until regulations are made for the purposes of section 16M (2), regulations are taken to include provisions providing that:

- (a) the prescribed rate at which an amount equivalent to interest is payable on a security bond is the rate payable (as at the last day of the month for which interest is being calculated) by the Commonwealth Bank of Australia on a Streamline Account balance of \$1,000, and
- (b) the interest payable on a security bond is to be compounded on 30 June and 31 December in each year.



**24 Keeping of copies of receipts for security bonds—section 16O**

Until regulations are made for the purposes of section 16O (3), regulations are taken to include a provision providing that a copy of a receipt given for money deposited or paid as a security bond must be kept for a term:

- (a) commencing on the date the money was received, and
- (b) ending with the date that is 6 months after the date of termination of the retail shop lease concerned.

**25 Valuations by specialist retail valuer—sections 19 and 31**

The amendments made to section 19 or 31 by the 2005 Amending Act do not apply to or in respect of the determination by valuation of a current market rent if a specialist retail valuer was appointed before the commencement of those amendments in relation to that valuation.

**26 Outgoings estimates and statements—sections 27 and 28**

- (1) Section 27 (c) or 28 (b1) as inserted by the 2005 Amending Act applies, in relation to a retail shop lease entered into before or after the commencement of the paragraph, as on and from the relevant day, unless the lessor elects to act in conformity with the inserted paragraph.
- (2) The *relevant day* is the last day of the period of 6 months commencing on the date of commencement of that paragraph.
- (3) Section 28 (2) as inserted by the 2005 Amending Act does not apply where the auditor received the outgoings statement before the commencement of that subsection.

**27 Review of current market rent determinations—section 32A**

Section 32A as inserted by the 2005 Amending Act does not apply in relation to a determination made by a specialist retail valuer before the commencement of that section.

**28 Lessee to be compensated for disturbance—section 34**

The amendment made to section 34 by the 2005 Amending Act does not apply to retail shop leases entered into before the commencement of that amendment.

**29 Relocation—section 34A**

The amendments made to section 34A by the 2005 Amending Act do not apply to costs incurred before the commencement of those amendments.

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**30 Negotiations for renewal or extension of lease—section 44A**

- (1) This clause applies to a retail shop lease entered into before the commencement of section 44A as inserted by the 2005 Amending Act.
- (2) Section 44A applies to the lease on and from the expiry of the period of 6 months commencing on the date of commencement of that section.

**31 Advertising and promotion expenditure statements—sections 54 and 55**

- (1) An amendment made by the 2005 Amending Act to section 54 or 55 applies, in relation to a retail shop lease entered into:
  - (a) before the commencement of that amendment, or
  - (b) after that commencement but before the relevant day, as on and from the relevant day, unless the lessor elects to act in conformity with that amendment.
- (2) The *relevant day* is the last day of the period of 6 months commencing on the date of commencement of the amendment to section 54 or 55.
- (3) Section 55 (3) as inserted by the 2005 Amending Act does not apply where the auditor received the advertising statement before the commencement of that subsection.

**32 Non-provision of marketing plan or advertising and promotion statement—section 55A**

Section 55A as inserted by the 2005 Amending Act extends to and in respect of retail shop leases entered into before the commencement of that section, but does not apply in relation to a lessor's failure referred to in section 55A (1) (a) that occurred before that commencement.

**33 Misleading or deceptive conduct—Division 2 of Part 7A (ss 62C–62E)**

Division 2 of Part 7A of this Act extends to a retail shop lease that was entered into before the commencement of that Division, but does not apply to conduct that occurred before that commencement.

**34 Lodging of claims after 3 years—section 71B**

Section 71B as inserted by the 2005 Amending Act extends to a liability or obligation that arose, or conduct that occurred, before the commencement of that section.

**35 Removal of proceedings to Supreme Court—section 76A**

The amendments made to section 76A by the 2005 Amending Act extend to unconscionable conduct occurring before the commencement of those amendments, but do not apply in relation to proceedings pending at that commencement.

**36 Appeals—section 77**

The amendment made to section 77 by the 2005 Amending Act extends to unconscionable conduct occurring before the commencement of that amendment, but does not apply in relation to proceedings pending at that commencement.

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## **Schedule 2      Amendment of Fines Act 1996**

(Section 4)

### **Schedule 1 Statutory provisions under which penalty notices issued**

Insert in alphabetical order:

*Retail Leases Act 1994*, section 16P