



New South Wales

Retail Leases Amendment Act 1998 No 169

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New South Wales

Retail Leases Amendment Act 1998 No 169

Act No 169, 1998

An Act to amend the *Retail Leases Act 1994* with respect to the application of the Act, information to be disclosed by lessees and assignors, the calculation of current market rents, costs payable by lessees under retail shop leases, sinking funds maintained by lessors and unconscionable conduct by lessors and lessees and to confer jurisdiction relating to claims under the Act on the Administrative Decisions Tribunal; to make consequential amendments to other Acts; and for other purposes. [Assented to 14 December 1998]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Retail Leases Amendment Act 1998*.

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 other Acts

The Acts set out in Schedule 2 are amended as set out in that Schedule.

Schedule 1 Amendment of Retail Leases Act 1994

(Section 3)

[1] Section 3 Definitions

Insert in alphabetical order:

assignor's disclosure statement means a statement referred to in section 41.

[2] Section 3

Insert "*lessor's*" before "*disclosure*" in the definition of *disclosure statement* in section 3.

[3] Section 3

Insert in alphabetical order:

exercise of a function includes the performance of a duty.

function includes a power, authority or duty.

[4] Section 3

Insert in alphabetical order:

lessee's disclosure statement means a statement referred to in section 11A.

[5] Section 3

Insert in alphabetical order:

licensed conveyancer means the holder of a licence under the *Conveyancers Licensing Act 1995*.

[6] Section 3

Insert in alphabetical order:

specialist retail valuer means:

- (a) for the purposes of a valuation relating to a retail shop in a retail shopping centre, a valuer having not less than 5 years' experience in valuing retail shops located in regional and sub-regional shopping centres, or
- (b) for the purposes of a valuation relating to any other retail shop, a valuer having not less than 5 years' experience in valuing retail shops.

[7] Section 6 Leases to which Act does not apply

Insert at the end of section 6:

- (2) This Act does not apply to any lease referred to in this section that is assigned to another person after the commencement of this section.

[8] Section 10 Right to compensation for pre-lease misrepresentations

Insert "lessor's" before "disclosure statement" where firstly occurring in section 10 (2).

[9] Section 10 (2A)

Insert after section 10 (2):

- (2A) The making of a representation by a prospective lessee in a lessee's disclosure statement given to a prospective lessor under a retail shop lease that the prospective lessee has sought independent advice, or as to statements or representations relied on by the prospective lessee in entering the lease, is considered to be the making of a representation by a lessee to the lessor.

[10] Section 11 Lessee to be given disclosure statement

Insert "Part 1 of the form contained in" before "Schedule 2" wherever occurring in section 11 (1).

[11] Section 11 (1)

Insert at the end of section 11 (1):

However, a lessor's disclosure statement is complete for the purposes of this section only if it has attached to it a form to be completed by the lessee as set out in Part 2 of the form contained in Schedule 2.

[12] Section 11 (2)

Omit "3 months". Insert instead "6 months".

[13] Section 11 (4)

Omit "a 'disclosure update' ".
Insert instead "a *lessor's disclosure update*".

[14] Section 11 (4)

Omit "the disclosure update".
Insert instead "the lessor's disclosure update".

[15] Section 11 (6)

Insert after section 11 (5):

- (6) A lessor under a retail shop lease is guilty of an offence if subsection (1) is not complied with in relation to the lease.

Maximum penalty: 50 penalty units.

[16] Section 11A

Insert after section 11:

11A Lessee's disclosure statement

- (1) Not later than 7 days after receiving a lessor's disclosure statement, or within such further period as may be agreed with the prospective lessor, the lessor must be given a lessee's disclosure statement. A lessee's disclosure statement is a statement in writing that contains the information that is contained in or required to complete the form of lessee's disclosure statement set out in Part 2 of the form contained in Schedule 2 (but only to the extent that it is relevant to the lease concerned). The layout of the lessee's disclosure statement need not comply with that of the form set out in Part 2 of the form contained in Schedule 2.
- (2) If a lease is entered into by way of the renewal of a lease, a written statement (a *lessee's disclosure update*) that updates the provisions of an earlier lessee's disclosure statement given to the lessor is, in conjunction with that earlier lessee's disclosure statement, considered to be the lessee's disclosure statement given for the purposes of this section at the time the lessee's disclosure update is given.
- (3) A lessee under a retail shop lease is guilty of an offence if subsection (1) is not complied with in relation to the lease.

Maximum penalty: 50 penalty units.
- (4) The regulations may prescribe additional matters to be included in the form of lessee's disclosure statement for the purposes of this section.

[17] Section 16 Minimum 5 year term

Insert “. or a licensed conveyancer,” after “lawyer” in section 16 (3).

[18] Section 18 Restrictions on adjustment of base rent

Omit section 18 (4). Insert instead:

- (4) If a retail shop lease provides for a change to base rent in a way that has the potential to cause that rent to decrease (such as a provision for the rent to change to current market rent), a provision of the lease is void to the extent that it:
 - (a) prevents or enables the lessor or any other person to prevent base rent decreasing pursuant to the change, or
 - (b) limits or specifies, or allows the limitation or specification of, the amount by which the base rent is to decrease.

[19] Section 19

Omit the section. Insert instead:

19 Reviews to current market rent

- (1) A retail shop lease that provides for rent to be changed to current market rent is taken to include provision to the following effect:
 - (a) The current market rent is the rent that would reasonably be expected to be paid for the shop, determined on an effective rent basis, having regard to the following matters:
 - (i) the provisions of the lease,
 - (ii) the rent that would reasonably be expected to be paid for the shop if it were unoccupied and offered for renting for the same or a substantially similar use to which the shop may be put under the lease,
 - (iii) the gross rent, less the lessor's outgoings payable by the lessee,
 - (iv) rent concessions and other benefits that are frequently or generally offered to prospective lessees of unoccupied retail shops.

The current market rent is not to take into account the value of goodwill created by the lessee's occupation or the value of the lessee's fixtures and fittings on the retail shop premises.

- (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 between the parties to the lease, or failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Property Institute (NSW) or President of the Real Estate Institute (NSW).

Note. The parties may agree to appoint a specialist retail valuer nominated by the President of the Australian Property Institute (NSW) or the President of the Real Estate Institute (NSW), or nominated by some other person of the parties' choice.

- (c) The matters set out in paragraph (a) are to be taken into account by a specialist retail valuer appointed under paragraph (b) in determining the amount of the rent.
- (d) The lessor must, not later than 14 days after a request by a specialist retail valuer appointed under paragraph (b), supply the valuer with relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the current market rent.
- (e) A valuation for the purposes of paragraph (b) is to be in writing, to contain detailed reasons for the specialist retail valuer's determination and to specify the matters to which the valuer had regard for the purposes of making his or her determination.

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- (f) The parties to the lease are to pay the costs of a valuation by a specialist retail valuer appointed under paragraph (b) in equal shares.

Note. The procedure provided by this section can be avoided if the parties can come to an agreement as to what the rent is to be.

- (2) A specialist retail valuer must make a valuation of a current market rent for the purposes referred to in this section not later than 1 month after accepting the appointment to make the valuation.
- (3) A specialist retail valuer may apply to the Tribunal under Part 8 for an order that a lessor comply with a request referred to in subsection (1) (d) to supply relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the rent.

[20] Section 19A

Insert after section 19:

19A Information supplied to valuer

- (1) A specialist retail valuer who is supplied with information by a lessor or a lessee for the purpose of determining under section 19 the amount of rent under a retail shop lease must not:
- (a) use or permit the use of the information for any purpose other than to determine the current market rent for the lease concerned, or
- (b) communicate or divulge that information to any other person or permit that information to be communicated or divulged to any other person.

Maximum penalty: 50 penalty units.

- (2) This section does not prevent the specialist retail valuer using or communicating or divulging that information, or permitting any other person to do so, in the following circumstances:

- (a) in accordance with a consent of both the lessor and the lessee,
 - (b) to a court or tribunal,
 - (c) in a way that does not disclose information identifying a particular lease or lessee, or relating to a lessee's business, for the purpose of specifying the matters taken into consideration in making the determination concerned.
- (3) A specialist retail valuer who contravenes this section is liable to pay to the lessor or lessee concerned compensation for any loss or damage suffered by the lessor or lessee as a result of the information being so used or communicated or divulged. The amount of the compensation is to be the amount agreed between the valuer and the person seeking compensation or, in the event of a failure to agree, as determined by the Tribunal under Part 8.

[21] Sections 24A and 24B

Insert after section 24:

24A Interest and charges incurred by lessor on borrowings not recoverable from lessee

A provision in a retail shop lease is void to the extent that it requires the lessee to pay an amount in respect of interest or other charges incurred by the lessor in respect of amounts borrowed by the lessor.

24B Rent and other costs associated with other land not recoverable from lessee

- (1) A provision in a retail shop lease is void to the extent that it requires the lessee to pay an amount in respect of rent and other costs associated with unrelated land.
- (2) In this section:
 - unrelated land*** means land other than:
 - (a) land on which the building or retail shopping centre of which the retail shop forms part is situated, or

- (b) land of the lessor used by or for the benefit of the lessees conducting business in that building or retail shopping centre or in connection with trading in that building or retail shopping centre.

[22] Section 25 Sinking fund for major repairs and maintenance

Insert after the note to section 25 (d):

- (e) The major items of repair or maintenance for which contribution to the sinking fund may be required by the lessee are limited to repair or maintenance of a building, or plant and equipment of a building, in which the retail shop is situated or, in the case of a retail shopping centre, to the buildings, plant and equipment and areas used in association with the retail shopping centre in which the retail shop is situated.
- (f) The lessee is not liable to contribute an amount to the sinking fund that is greater than the maximum amount permitted under the Act.
- (g) The lessor must keep full and accurate accounts of all money received or held by the lessor in respect of the sinking fund.
- (h) The lessor must give the lessee, not later than 3 months after the end of each accounting period of the lessor during the term of the lease, a sinking fund statement containing details of expenditure during the period from the fund on items for which the lessee is required to contribute. The lessor must also provide with the statement a report on the statement prepared by a registered company auditor (within the meaning of the *Corporations Law*).
- (i) A sinking fund statement provided by a lessor to a lessee is to be prepared in accordance with the relevant principles and disclosure requirements of applicable accounting standards made by the Australian Accounting Standards Board, as in force from time to time.

[23] Sections 25A and 25B

Insert after section 25:

25A Limits on sinking funds

- (1) This section applies to the lessor under a retail shop lease that provides for the establishment of a sinking fund to fund provision for major items of repair or maintenance.
- (2) The lessor must not establish more than one sinking fund at any one time in respect of retail shop leases for retail shops situated in the same building or retail shopping centre.
- (3) The lessor must not require or accept contributions to the sinking fund in respect of any retail shop situated in a retail shopping centre that total an amount that exceeds 5% of the total of the lessor's estimated outgoings for the year concerned in respect of the retail shopping centre.
- (4) The lessor must not require or accept contributions by a lessee to the sinking fund if the amount outstanding to the credit of the sinking fund is more than \$250,000.

Maximum penalty (subsections (2), (3) and (4)): 50 penalty units.

25B Sinking fund repayment

- (1) This section applies to the lessor under a retail shop lease of a retail shop that provides for the establishment of a sinking fund to fund provision for major items of repair or maintenance.
- (2) If the building or retail shopping centre in which the retail shop is located is destroyed or demolished or, in the case of a retail shopping centre, the retail shopping centre ceases to operate, the lessor must repay to each lessee liable to contribute to the sinking fund the amount payable to the lessee.
- (3) The amount payable to the lessee is that proportion of the total amount outstanding to the credit of the sinking fund that is equal to the proportion that the lettable area of the lessee's retail shop bears to the total lettable area of all the shops in respect of which contributions are required to be made to the fund.

(4) In this section:

lessor and *lessee* mean the persons who were the lessor and lessee, respectively, under a retail shop lease immediately before the destruction or demolition of the building, or immediately before the retail shopping centre ceased to operate.

[24] Section 27 Estimates and expenditure statement of outgoings to be provided by lessor

Omit "disclosure statement set out in Schedule 2" wherever occurring in section 27 (a) and (c).

Insert instead "lessor's disclosure statement set out in Part 1 of the form contained in Schedule 2".

[25] Section 31

Omit the section. Insert instead:

31 Reviews to current market rent

- (1) A retail shop lease that provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect:
 - (a) The current market rent is the rent that would reasonably be expected to be paid for the shop, determined on an effective rent basis, having regard to the following matters:
 - (i) the provisions of the lease,
 - (ii) the rent that would reasonably be expected to be paid for the shop if it were unoccupied and offered for renting for the same or a substantially similar use to which the shop may be put under the lease,
 - (iii) the gross rent, less the lessor's outgoings payable by the lessee,

- (iv) rent concessions and other benefits that are frequently or generally offered to prospective lessees of unoccupied retail shops.

The current market rent is not to take into account the value of goodwill created by the lessee's occupation or the value of the lessee's fixtures and fittings on the retail shop premises.

- (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 between the parties to the lease, or failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Property Institute (NSW) or President of the Real Estate Institute (NSW).

Note. The parties may agree to appoint a specialist retail valuer nominated by the President of the Australian Property Institute (NSW) or the President of the Real Estate Institute (NSW), or nominated by some other person of the parties' choice.

- (c) The matters set out in paragraph (a) are to be taken into account by a specialist retail valuer appointed under paragraph (b) in determining the amount of the rent.
- (d) The lessor must, not later than 14 days after a request by a specialist retail valuer appointed under paragraph (b), supply the valuer with relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the current market rent.
- (e) A valuation for the purposes of paragraph (b) is to be in writing and to contain detailed reasons for the specialist retail valuer's determination and to specify the matters to which the valuer had regard for the purposes of making his or her determination.

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- (f) The parties to the lease are to pay the costs of a valuation by a specialist retail valuer appointed under paragraph (b) in equal shares.

Note. The procedure provided by this section can be avoided if the parties can come to an agreement as to what the rent is to be.

- (2) A specialist retail valuer must make a valuation of a current market rent for the purposes referred to in this section not later than 1 month after accepting the appointment to make the valuation.
- (3) A specialist retail valuer may apply to the Tribunal under Part 8 for an order that a lessor comply with a request referred to in subsection (1) (d) to supply relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the rent.

[26] Section 31A

Insert after section 31:

31A Information supplied to valuer

- (1) A specialist retail valuer who is supplied with information by a lessor or a lessee for the purpose of determining under section 31 the amount of rent under a retail shop lease must not:
- (a) use or permit the use of the information for any purpose other than to determine the current market rent for the lease concerned, or
 - (b) communicate or divulge that information to any other person or permit that information to be communicated or divulged to any other person.

Maximum penalty: 50 penalty units.

- (2) This section does not prevent the specialist retail valuer using or communicating or divulging that information, or permitting any other person to do so, in the following circumstances:
- (a) in accordance with a consent of both the lessor and the lessee,

- (b) to a court or tribunal,
 - (c) in a way that does not disclose information identifying a particular lease or lessee, or relating to a lessee's business, for the purpose of specifying the matters taken into consideration in making the determination concerned.
- (3) A specialist retail valuer who contravenes this section is liable to pay to the lessor or lessee concerned compensation for any loss or damage suffered by the lessor or lessee as a result of the information being so used or communicated or divulged. The amount of the compensation is to be the amount agreed between the valuer and the person seeking compensation or, in the event of a failure to agree, as determined by the Tribunal.

[27] Section 34A

Insert after section 34:

34A Relocation

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

- (a) The lessee's business cannot be required to be relocated unless and until the lessor has provided the lessee with details of a proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that is to be carried out within a reasonably practicable time after relocation of the lessee's business and that cannot be carried out practicably without vacant possession of the lessee's shop.
- (b) The lessee's business cannot be required to be relocated unless the lessor has given the lessee at least 3 months written notice of relocation and that notice gives details of an alternative shop to be made available to the lessee within the retail shopping centre. Such a notice is referred to as a *relocation notice*.

- (c) The lessee is entitled to be offered a new lease of the alternative shop on the same terms and conditions as the existing lease except that the term of the new lease is to be for the remainder of the term of the existing lease. The rent for the alternative shop is to be the same as the rent for the existing retail shop, adjusted to take into account the difference in the commercial values of the existing retail shop and the alternative shop at the time of relocation.

Note. Paragraph (c) only specifies the minimum entitlements that the lessee can insist on. It does not prevent the lessee from accepting other arrangements offered by the lessor when the details of a relocation are being negotiated.

- (d) If a relocation notice is given to the lessee, the lessee may terminate the lease within 1 month after the relocation notice is given by giving written notice of termination to the lessor, in which case the lease is terminated 3 months after the relocation notice was given unless the parties agree that it is to terminate at some other time.
- (e) If the lessee does not give a notice of termination as referred to in paragraph (d), the lessee is taken to have accepted the offer of a lease as referred to in paragraph (c), unless the parties have agreed to a lease on some other terms.
- (f) The lessee is entitled to payment by the lessor of the lessee's reasonable costs of the relocation, including (but without being limited to) costs incurred by the lessee in dismantling and reinstalling any fixtures and fittings, and legal costs, in connection with the relocation.

Note. This section does not prevent the parties negotiating a new 5 year lease for the purpose of relocating the lessee. Paragraph (f) only specifies the minimum entitlements that the lessee can insist on and the parties can come to some other arrangement for the payment or sharing of the lessee's relocation costs when the details of a relocation are being negotiated.

[28] Section 35 Demolition

Insert after section 35 (3):

- (3A) If a retail shop lease is terminated on such a ground, the lessor is liable to pay the lessee compensation for the fitout of the retail shop if the lessee is required under the lease to fit out the retail shop, whether or not the demolition of the building is carried out.

[29] Section 41 Procedure for obtaining consent to assignment

Insert "The lessee may provide the lessor with a copy of a statement in writing that contains the information that is contained in or required to complete the form set out in Schedule 2A that has been provided to the proposed assignee. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the form set out in Schedule 2A." after "assignee." in section 41 (a).

[30] Section 41 (b)

Insert "The lessee may provide the proposed assignee with a copy of a statement in writing that contains the information that is contained in or required to complete the form set out in Schedule 2A. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the form set out in Schedule 2A." after "aware).".

[31] Section 41A

Insert after section 41:

41A Protection of assignors and guarantors

- (1) A person who assigns a retail shop lease in connection with the lease of a retail shop that will continue to be an ongoing business, or a guarantor or covenantor of the person, is not liable to pay to the lessor any money in respect of amounts payable by the person to whom the lease is assigned if the former lessee gave:

- (a) the lessor a copy of the assignor's disclosure statement as referred to in section 41 (a), and
 - (b) the proposed assignee a copy of the assignor's disclosure statement as referred to in section 41 (b).
- (2) This section does not apply to a former lessee, guarantor or covenantor or a lessor if the assignor's disclosure statement contains information that is materially false or misleading or incomplete.

[32] Section 48 Independent legal advice

Insert "or licensed conveyancer" after "lawyer" wherever occurring.

[33] Section 57 Relocation

Omit the section.

[34] Part 7A

Insert after Part 7:

Part 7A Unconscionable conduct

62A Application of Part

- (1) This Part extends to apply to a retail shop lease that was entered into before the commencement of section 6 or under an option granted or agreement made before the commencement of section 6, but only if this Act would have applied to the lease if it had been entered into after the commencement of section 6.
- (2) This Part does not apply to conduct that occurred before the commencement of this section.

62B Unconscionable conduct in retail shop lease transactions

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

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- (g) the requirements of any applicable industry code, and
 - (h) the requirements of any other industry code, if the lessee acted on the reasonable belief that the lessor would comply with that code, and
 - (i) the extent to which the lessor unreasonably failed to disclose to the lessee:
 - (i) any intended conduct of the lessor that might affect the interests of the lessee, and
 - (ii) any risks to the lessee arising from the lessor's intended conduct (being risks that the lessor should have foreseen would not be apparent to the lessee), and
 - (j) the extent to which the lessor was willing to negotiate the terms and conditions of any lease with the lessee, and
 - (k) the extent to which the lessor and the lessee acted in good faith.
- (4) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a lessee has contravened subsection (2) in connection with a retail shop lease, the Tribunal may have regard to:
- (a) the relative strengths of the bargaining positions of the lessee and the lessor, and
 - (b) whether, as a result of conduct engaged in by the lessee, the lessor was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the lessee, and
 - (c) whether the lessor was able to understand any documents relating to the lease, and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the lessor or a person acting on behalf of the lessor by the lessee or a person acting on behalf of the lessee in relation to the lease, and

- (e) the amount for which, and the circumstances under which, the lessor could have granted an identical or equivalent lease to a person other than the lessee, and
 - (f) the extent to which the lessee's conduct towards the lessor was consistent with the lessee's conduct in similar transactions between the lessee and other like lessors, and
 - (g) the requirements of any applicable industry code, and
 - (h) the requirements of any other industry code, if the lessor acted on the reasonable belief that the lessee would comply with that code, and
 - (i) the extent to which the lessee unreasonably failed to disclose to the lessor:
 - (i) any intended conduct of the lessee that might affect the interests of the lessor, and
 - (ii) any risks to the lessor arising from the lessee's intended conduct (being risks that the lessee should have foreseen would not be apparent to the lessor), and
 - (j) the extent to which the lessee was willing to negotiate the terms and conditions of any lease with the lessor, and
 - (k) the extent to which the lessee and the lessor acted in good faith.
- (5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with a retail shop lease by reason only that the first-mentioned person institutes legal proceedings in relation to that lease or refers to arbitration a dispute or claim in relation to that lease.
- (6) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with a retail shop lease by reason only that the first-mentioned person fails to renew the lease or issue a new lease.

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- (7) For the purpose of determining whether a lessor has contravened subsection (1) or whether a lessee has contravened subsection (2):
- (a) the Tribunal must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention, and
 - (b) the Tribunal may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.
- (8) A lessor or lessee, or former lessor or lessee, who suffers loss or damage by reason of unconscionable conduct of another person that is in contravention of this section may recover the amount of the loss or damage by lodging a claim against the other person under section 71A.
- (9) If the matter of such loss or damage arises in connection with a matter the subject of proceedings in the Tribunal, the Tribunal may proceed to decide it, and in so doing may award such sum as it thinks fit.

[35] Section 63 Interpretation

Insert "or former lease" after "lease" wherever occurring in the definition of *retail tenancy dispute* in section 63 (1).

[36] Section 63 (1), definition of "Tribunal"

Omit the definition. Insert instead:

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

[37] Section 65 Functions of Registrar

Insert ", or by some other appropriate form of alternative dispute resolution," after "mediation" in section 65 (1) (a).

[38] Section 65 (1) (a1)

Insert after section 65 (1) (a):

- (a1) to make arrangements to facilitate the resolution by mediation, or by some other appropriate form of alternative dispute resolution, of disputes or applications under section 19 (3), 19A (3), 31 (3) or 31A (3) or the subject, or possible subject, of a claim under section 62B,

[39] Section 65 (1) (c) and (d)

Omit section 65 (1) (c). Insert instead:

- (c) to take proceedings for an offence against this Act or to authorise persons to take proceedings for offences against this Act,
- (d) such other functions as may be conferred or imposed on the Registrar by or under this or any other Act.

[40] Section 65 (3)

Omit "retail tenancy disputes, the Registrar is to have regard to the need for mediation of those disputes".

Insert instead "disputes or other matters, the Registrar is to have regard to the need for mediation of those disputes or other matters".

[41] Section 66 Mediation of disputes and other matters

Insert "or other dispute or matter referred to in section 65 (1) (a1)" after "retail tenancy dispute" wherever occurring in section 66 (1).

[42] Section 66 (1) and (2)

Insert "or other dispute or matter" after "retail tenancy dispute" wherever occurring.

[43] Section 66 (3)

Insert after section 66 (2):

- (3) A mediator has, in the exercise of functions performed as a mediator under this Act, the same protection and immunities as a Judge of the Supreme Court.

[44] Section 68 Disputes and other matters must be submitted to mediation before proceedings can be taken

Insert "or other dispute or matter referred to in section 65 (1) (a1)" after "retail tenancy dispute" wherever occurring in section 68 (1) and (2).

[45] Sections 68 (1) and (2) and 74 (2)

Insert "or matter" after "the dispute" wherever occurring.

[46] Section 69 Statements made during mediation not admissible

Insert "or other dispute or matter referred to in section 65 (1) (a1)" after "retail tenancy dispute".

[47] Part 8, Division 3, heading

Omit the heading. Insert instead:

Division 3 Determination of claims by Administrative Decisions Tribunal

[48] Section 70

Omit the section. Insert instead:

70 Definitions

In this Division:

retail tenancy claim means any of the following:

- (a) a claim in connection with a liability or obligation with which a retail tenancy dispute is concerned, being:
- (i) a claim for the payment of a specified sum of money.

- (ii) a claim for relief from payment of a specified sum of money,
- (iii) a claim for the doing of specified work or the provision of specified services,
- (b) an application under section 19 (3) or 31 (3) by a specialist retail valuer,
- (c) a claim against a specialist retail valuer under section 19A (3) or 31A (3) for compensation for loss or damage suffered as a consequence of the use or communication or divulging of information.

unconscionable conduct claim means a claim for relief under section 62B.

[49] Sections 71 and 71A

Omit section 71. Insert instead:

71 Lodging of retail tenancy claims with Tribunal

- (1) A party or former party to a retail shop lease or former retail shop lease may lodge a retail tenancy claim in respect of the lease with the Tribunal for determination of the claim.
- (2) A claim may not be lodged more than 3 years after the liability or obligation that is the subject of the claim arose.
- (3) In this section:

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.

Note. Under section 37 of the *Administrative Decisions Tribunal Act 1997*, the effect of enabling applications to be made to the Tribunal is to confer jurisdiction on it. By virtue of section 142 of that Act, an application includes a mechanism by which an Act provides for a matter to be brought to the attention of the Tribunal for an original decision.

71A Lodging of unconscionable conduct claims with Tribunal

- (1) A lessor or lessee, or former lessor or lessee, under a retail shop lease or former retail shop lease may lodge an unconscionable conduct claim with the Tribunal for determination of the claim.
- (2) A claim may not be lodged more than 3 years after the alleged unconscionable conduct occurred.
- (3) In this section:

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.

[50] Section 72

Omit the section. Insert instead:

72 Powers of Tribunal relating to retail tenancy claims

- (1) In proceedings for a retail tenancy claim lodged with the Tribunal under this Part, the Tribunal is empowered to make any one or more of the following orders that it considers appropriate:
 - (a) an order that a party to the proceedings pay money to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
 - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,
 - (c) an order that a party to the proceedings:
 - (i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of a lease, or

- (ii) surrender possession of specified premises to another person, or
 - (iii) assign his or her or its rights under a lease to a specified person, or
 - (iv) do or perform, or refrain from doing or performing, any specified act, matter or thing,
 - (d) an order granting a party to the proceedings relief against forfeiture,
 - (e) an order, by consent of the parties, requiring the parties to the proceedings to rectify a lease,
 - (f) an order:
 - (i) declaring any provision made by a lease to be void for being inconsistent with this Act or the regulations, or
 - (ii) declaring that a lessor is not entitled to withhold consent to an assignment of the rights of a lessee, or
 - (iii) declaring the rights and liabilities of the parties under law, whether any consequential relief is or could be claimed or not,
 - (g) such other order, in the nature of an interlocutory order of a kind referred to in paragraphs (a)–(f), as the Tribunal considers proper to be made in order to resolve or assist resolution of the dispute between the parties.
- (2) The Tribunal may make such ancillary orders as it considers necessary for the purpose of enabling an order under this section to have full effect.
- (3) The Tribunal may impose such conditions as it considers appropriate when making an order under this section.
- (4) The Tribunal may make an interim order under this section pending final determination of a claim, if it appears to the Tribunal desirable to do so.

[51] Section 72AA

Insert after section 72:

72AA Powers of Tribunal relating to unconscionable conduct claims

- (1) In proceedings for an unconscionable conduct claim lodged with the Tribunal under this Part, the Tribunal is empowered to make any one or more of the following orders that it considers appropriate:
 - (a) an order that a party to the proceedings pay money to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
 - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings.
- (2) The Tribunal may make such ancillary orders as it considers necessary for the purpose of enabling an order under this section to have full effect.
- (3) The Tribunal may impose such conditions as it considers appropriate when making an order under this section.
- (4) The Tribunal may make an interim order under this section pending final determination of a claim, if it appears to the Tribunal desirable to do so.

[52] Sections 72A, 73, 74 (1), 76

Insert "or an unconscionable conduct claim" after "retail tenancy claim" wherever occurring.

[53] Section 73 Monetary limit on Tribunal's jurisdiction

Omit "\$250,000". Insert instead "\$300,000".

[54] Section 74 Tribunal must attempt to conciliate

Insert after section 74 (3):

- (4) Part 4 of Chapter 6 of the *Administrative Decisions Tribunal Act 1997* does not apply to a retail tenancy claim or an unconscionable conduct claim that may be made to the Tribunal under this Act.

[55] Section 76A

Insert after section 76:

76A Removal of proceedings to Supreme Court

- (1) A party to proceedings before the Tribunal for an unconscionable conduct claim may apply to the Tribunal to have the proceedings transferred to the Supreme Court.
- (2) The Tribunal must transfer the proceedings if the Tribunal is satisfied that:
 - (a) the nature of the claim is such that it may be more effectively and appropriately dealt with by the Supreme Court, and
 - (b) the interests of justice do not require the matter to be continued to be dealt with by the Tribunal.
- (3) The Supreme Court has jurisdiction to hear and determine proceedings for an unconscionable conduct claim transferred to it under this section and may make any orders and do anything that the Tribunal may do in determining an unconscionable conduct claim.
- (4) The Supreme Court may exercise all the functions that are conferred or imposed by or under this or any other Act on the Tribunal to determine the unconscionable conduct claim.

[56] Sections 77, 77A, 77B and 77C

Omit section 77. Insert instead:

77 Appeals

- (1) A party to any proceedings (other than a party to proceedings for an unconscionable conduct claim) in which the Tribunal makes an order or other decision under this Act may appeal to an Appeal Panel of the Tribunal under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997*.
- (2) A party to any proceedings for an unconscionable conduct claim may appeal to the Supreme Court, on a question of law, against any decision of the Tribunal in those proceedings.
- (3) Sections 120 and 121 of the *Administrative Decisions Tribunal Act 1997* apply to an appeal to the Supreme Court under subsection (2) in the same way as they apply to an appeal to the Supreme Court, on a question of law, against a decision of the Appeal Panel.
- (4) A party to any proceedings for an unconscionable conduct claim may appeal to the Supreme Court, with the leave of the Supreme Court, for a review of the merits of a decision by the Tribunal in those proceedings.
- (5) Sections 115 and 116 of the *Administrative Decisions Tribunal Act 1997* apply to an appeal to the Supreme Court under subsection (4) in the same way as they apply to appeals to the Appeal Panel under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997* that extend to a review of the merits of an appealable decision.
- (6) If proceedings relate partly to a retail tenancy claim and partly to an unconscionable conduct claim, subsections (2)–(5) apply to those proceedings.

- (7) An appeal to the Supreme Court by a person under this section must be made:
- (a) within such time and in such manner as is prescribed by rules of court made under the *Supreme Court Act 1970*, or
 - (b) within such further time as the Supreme Court may allow.

77A Tribunal may award costs

The Tribunal may award costs under section 88 of the *Administrative Decisions Tribunal Act 1997* in respect of proceedings commenced by an application made under this Part.

77B Assessors

Part 5 of Chapter 2 of the *Administrative Decisions Tribunal Act 1997*, and section 74 of that Act, insofar as it relates to assessors, do not apply to a claim that may be made to the Tribunal under this Act.

77C Right of appearance

- (1) In any proceedings before the Tribunal, the parties to the proceedings may appear in person or may be represented by a lawyer or other agent.
- (2) This section applies despite the provisions of section 71 of the *Administrative Decisions Tribunal Act 1997*.

[57] Section 86 Review of Act

Omit "5 years" wherever occurring in section 86 (2) and (3).
Insert instead "7 years".

[58] Schedule 2

Omit the Schedule. Insert instead:

Schedule 2

(Sections 11, 11A)

Lessor and lessee disclosure statements

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.

Tenancy details

Address of Shop/Shop No.	Lettable Area (sq.m.)
Permitted Use of Shop	

Lease Period / /19 to / /19	Options No Yes	Option Periods / /
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: yes/no 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.		
Lessor's requirements as to quality and standard of fittings in shop. Rent: Method for Calculating Rent: 1. Commencement Date 2. Formula 3. Rent Reviews Frequency Nature		

Outgoings to be paid by the lessee

DETAILS OF OUTGOINGS	Estimate \$ p.a.	DETAILS OF OUTGOINGS	Estimate \$ p.a.
Air Conditioning/ Ventilation		Audit Fees	
Building Intelligence & Emergency Systems		Car Parking	
Child Minding		Cleaning	
Electricity		Energy Management Systems	
Fire Protection		Gardening	

Gas & Oil		Insurance	
Land Tax		Lifts and escalators	
Local Government rates and charges		Management Costs	
Pest Control		Public Address/Music	
Repairs and Maintenance		Sinking Fund for Repairs and Maintenance	
Security		Sewage Disposal & Sullage	
Signs		Telephones (Public)	
Uniforms		Water, sewerage and drainage rates and charges	
Others (specify)		Waste disposal and removal	
TOTAL (both columns)			
Formula for apportionment of outgoings if the lessee is not liable for the total amount			
Additional outgoings to be borne by lessee			

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 for customers Number of bays for lessees		
Facilities and services provided by the lessor		
Changes or developments planned by the lessor for: Retail Shopping Centre <input type="checkbox"/> No <input type="checkbox"/> Yes Attach details Surrounding Roads <input type="checkbox"/> No <input type="checkbox"/> 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.		
Tenant Association <input type="checkbox"/> No <input type="checkbox"/> Yes Attach details of constitution, voting rights, contributions		
Contribution to retail shopping centre advertising and promotion <input type="checkbox"/> No <input type="checkbox"/> Yes Lessee's contribution \$ per annum		

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.

Note. 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 so 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.
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 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

[59] Schedule 2A

Insert after Schedule 2:

Schedule 2A

(Section 41)

Assignor's disclosure statement

1. 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.
2. The assignee has been advised that there are no outstanding notices in respect of the lease.
3. The assignee has been advised that there are no outstanding notices from any authority in respect of the retail shop.
4. The assignee has been advised that there are/are not any encumbrances on the lease.
5. 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.
6. 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:
 - (a) (period/year) \$
 - (b) (period/year) \$
 - (c) (period/year) \$
7. 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:
 - (a) (period/year) \$
 - (b) (period/year) \$
 - (c) (period/year) \$

Signed by or for and on behalf of the Assignor

.....

Date

Signed by or for and on behalf of the Assignee

.....

Date

[60] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1 (1):

Retail Leases Amendment Act 1998

[61] Schedule 3, Part 3

Insert at the end of Part 2:

Part 3 Retail Leases Amendment Act 1998

9 Meaning of "1998 Amending Act"

In this Part:

1998 Amending Act means the *Retail Leases Amendment Act 1998*.

10 Application of 1998 amendments

The amendments made by the 1998 Amending Act do not extend:

- (a) to leases in existence when this clause commences, or

- (b) to any lease entered into under an option granted or agreement made before the commencement of this clause, or
- (c) to any lease referred to in paragraph (a) or (b) that is assigned to another person,

subject to the other provisions of this Part and section 62A.

11 Relocation

Section 34A, as inserted by the 1998 Amending Act, applies to the relocation of a retail shop, if the shop is situated in a retail shopping centre and the lease is a lease to which section 57 (as in force immediately before its repeal by the 1998 Amending Act) applied immediately before its repeal.

12 Rent decreases

Section 18 (4), as amended by the 1998 Amending Act, extends to leases that were entered into before the commencement of the amendment and to which this Act applies, but only in respect of decreases in rent occurring after that commencement.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Administrative Decisions Tribunal Act 1997 No 76

[1] Schedule 1 Divisions of Tribunal

Insert in alphabetical order:

Retail Leases Division

[2] Schedule 2 Composition and functions of Divisions

Insert before Part 4:

Part 3B Retail Leases Division

Division 1 Composition of Division

1 Division members

- (1) The Retail Leases Division is to be composed of the following members:
 - (a) a Divisional Head appointed in accordance with subclause (2),
 - (b) such other members as may be assigned to the Division in accordance with subclause (3) or otherwise by or under this Act.
- (2) A Deputy President is to be appointed as the Divisional Head by the Governor.
- (3) The following members are to be assigned to the Retail Leases Division of the Tribunal in their instruments of appointment or by subsequent instrument of the Minister:
 - (a) at least 1 member who is a retired judge of the Supreme Court or the Federal Court or who has equivalent experience or qualifications,

- (b) at least 1 member who has experience as a lessor, or working on behalf of lessors, under retail shop leases,
- (c) at least 1 member who has experience as a lessee, or working on behalf of lessees, under retail shop leases.

Division 2 Functions of Division

2 Functions allocated to Division

The functions of the Tribunal in relation to the following enactments are allocated to the Retail Leases Division of the Tribunal:

Retail Leases Act 1994

Division 3 Special requirements for constitution of Tribunal for certain allocated functions

3 Retail Leases Act 1994 (retail tenancy claims)

- (1) For the purposes of exercising its functions under the *Retail Leases Act 1994* in relation to retail tenancy claims the Tribunal is to be constituted by:
 - (a) the Divisional Head, or, if the Divisional Head is not available, a judicial member, and
 - (b) if requested by a party to the proceedings, 2 other members, consisting of a member of a kind referred to in clause 1 (3) (b) and a member of a kind referred to in clause 1 (3) (c).
- (2) If proceedings relate partly to an unconscionable conduct claim and partly to a retail tenancy claim, for the purposes of hearing and determining those claims the Tribunal is to be constituted in accordance with clause 4.

4 Retail Leases Act 1994 (unconscionable conduct)

- (1) For the purposes of exercising its functions under the *Retail Leases Act 1994* in relation to unconscionable conduct claims the Tribunal is to be constituted by a Division member referred to in clause 1 (3) (a).

- (2) The Tribunal is to be assisted by 2 other members, in an advisory capacity only, consisting of a member of a kind referred to in clause 1 (3) (b) and a member of a kind referred to in clause 1 (3) (c).
- (3) A member assisting the Tribunal under this clause is not to adjudicate on any matter before the Tribunal.
- (4) The Tribunal may commence or continue to determine the proceedings or any part of the proceedings:
 - (a) without the assistance of a member who is not available or has ceased to be available to assist in the proceedings, and
 - (b) without the assistance of the members generally if, in the opinion of the Tribunal, the proceedings or part of the proceedings concern or concerns a question of law only.

[3] Schedule 5

Insert in Schedule 5 with appropriate Part number (being a number greater than 3) and clause numbers (being numbers greater than 20):

**Part Provisions consequent on enactment of
Retail Leases Amendment Act 1998**

Definitions

In this Part:

amending Act means the *Retail Leases Amendment Act 1998*.

ADT means the Administrative Decisions Tribunal established by this Act.

Pending court proceedings

- (1) This clause applies to proceedings before a tribunal or court concerning a retail tenancy dispute that:
 - (a) were instituted before the commencement of any relevant amendment, and
 - (b) have not been finally determined by the tribunal or court before that commencement.

- (2) Proceedings to which this clause applies are to be determined as if this Act and the amending Act had not been enacted.
- (3) Accordingly, any rules, regulations or other law that would have been applicable to the proceedings had this Act and the amending Act not been enacted continue to apply to the proceedings as if neither Act had been enacted.
- (4) In this clause:

relevant amendment means an amendment made to another Act by the amending Act the effect of which is to confer jurisdiction on the ADT to determine any matter that, immediately before the commencement of that amendment, could have been determined by the court concerned.

2.2 Fair Trading Tribunal Act 1998

Schedule 4 Amendment of other Acts

Omit item 4.10.

[Minister's second reading speech made in—
Legislative Assembly on 28 October 1998
Legislative Council on 1 December 1998]

BY AUTHORITY

