

FIRST PRINT

## RETAIL TENANCIES (CODE OF PRACTICE) BILL, 1993

NEW SOUTH WALES



### EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The objects of this Bill are:

- (a) to allow relief to be granted under the Contracts Review Act 1980 in relation to agreements involving retail tenancies, and for that purpose to invest the Commercial Tribunal of New South Wales with jurisdiction under that Act; and
- (b) to regulate certain matters in connection with those agreements in order to help preserve the goodwill of businesses and prevent unfair business practices; and
- (c) to confer certain rights on parties to those agreements.

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### PART 1—PRELIMINARY

**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent.

**Clause 3** defines "retail tenancy agreement" and other terms used in the proposed Act.

### PART 2—APPLICATION OF CONTRACTS REVIEW ACT 1980

The Contracts Review Act 1980 allows a court to grant relief to persons who are parties to agreements that are unconscionable, harsh or oppressive. (It may, for example, vary the terms of the agreement or declare the agreement void.) The court's powers are restricted, however, in that:

- (a) only a natural person can obtain relief under the Act; and
- (b) relief cannot be granted in respect of a contract entered into for a trade, business or professional purpose.

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**Clause 4** removes the bar, imposed by section 6 of the Contracts Review Act 1980, to obtaining relief under that Act in relation to agreements in the nature of a commercial lease for the purpose of a business providing goods or services to the public. That relief will be available even if that party seeking relief is a corporation.

**Clause 5** allows the Commercial Tribunal of New South Wales to exercise the powers of the Supreme Court under the Contracts Review Act 1980 in respect of retail tenancy agreements.

**Clause 6** requires the proposed Act to be read and construed as part of the Contracts Review Act 1980.

**Clause 7** specifies the times within which an application for relief under the Contracts Review Act 1980 may be made to the Commercial Tribunal.

**PART 3—RETAIL TENANCY AGREEMENTS**

**Division 1—Regulation of retail tenancy agreements**

**Clause 8** provides that the term of a retail tenancy agreement must not be less than 5 years in the case of the first lease of the premises to the lessee. The lessee may waive the lessee's right to a 5-year term.

**Clause 9** provides that a lessor under a retail tenancy agreement must not unreasonably refuse to renew the agreement, subject to substantial performance by the lessee, for a further term in certain circumstances. The provision only operates in respect of the first renewal of the agreement. Subsequent agreements shall be for a minimum period of 2 years.

**Clause 10** prevents a lessor under a retail tenancy agreement from seeking key money or accepting any other sort of payment or benefit in connection with the entering of the agreement. Any refurbishing or refitting of premises required by the lessor is treated as a benefit to the lessor.

**Clause 11** prevents a lessor under a retail tenancy agreement from requiring the lessee to refurbish or refit the leased premises except in accordance with the terms of the lease and is reasonable in the circumstances. Any such requirement in the lease must indicate the general nature and timing of the refurbishment.

**Clause 12** requires the lessor under a retail tenancy agreement to notify the lessee of any proposed alterations or refurbishments to the building containing the retail premises that are likely to affect the lessee's business at those premises.

**Clause 13** provides that a retail tenancy agreement is not to contain a provision which terminates the lease or enables the lessor to terminate the lease if the lessee fails to achieve a certain level of turnover.

**Division 2—Enforcement of requirements of this Part**

**Clause 14** allows a lessee under a retail tenancy agreement to apply to the Commercial Tribunal for an order if a person is contravening the provisions of the Part. The Tribunal may order that the person discontinue the contravention and take specified action to rectify the consequences of the contravention. The specified action can include the payment of compensation and repayment or reimbursement of money and other benefits received by the lessor in contravention of this Part.

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**Clause 15** enables the Tribunal to vary orders made under this Part.

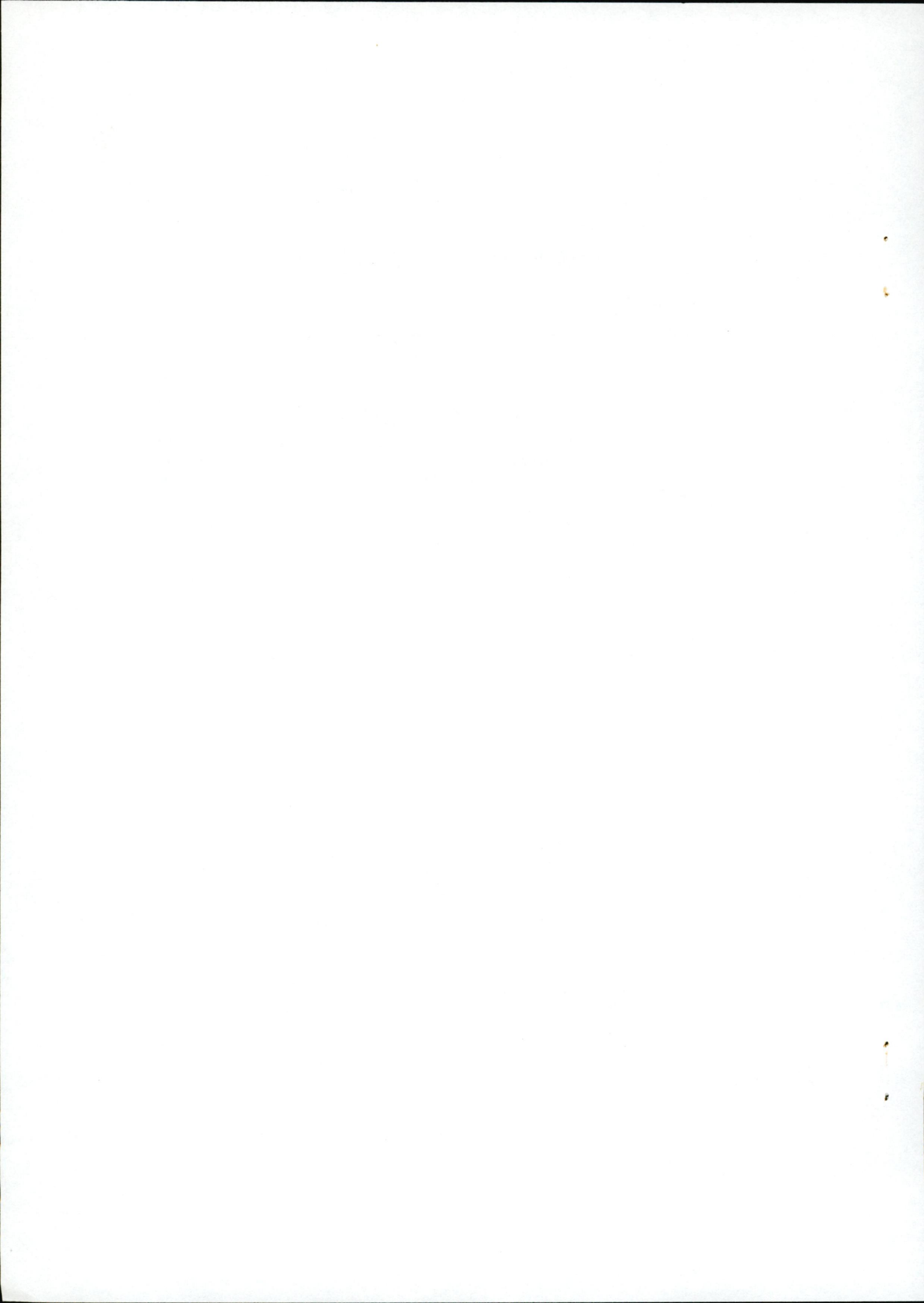
**Clause 16** enables the Supreme Court to grant an injunction for a contravention or proposed contravention of an order to the Commercial Tribunal under this Part.

**PART 4—MISCELLANEOUS**

**Clause 17** provides that the Tribunal is not to determine an application under this Part if the matter is already being dealt with by a court. A court hearing the matter may stay the proceedings if satisfied that the matter would be more appropriately dealt with by the Tribunal.

**Clause 18** provides that retail tenancy agreements entered into before the commencement of the proposed Act are not affected by the provisions of Part 2.

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NEW SOUTH WALES



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**RETAIL TENANCIES (CODE OF PRACTICE) BILL, 1993**

NEW SOUTH WALES



No.       , 1993

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**A BILL FOR**

An Act to provide for the application of the Contracts Review Act 1980 to agreements concerning leases of commercial premises and to make further provisions with respect to such agreements.

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The Legislature of New South Wales enacts:

**PART 1—PRELIMINARY**

**Short title**

1. This Act may be cited as the Retail Tenancies (Code of Practice)  
5 Bill 1993.

**Commencement**

2. This Act commences on the date of assent.

**Definitions**

3. In this Act:
- 10 “**Commissioner**” means the Commissioner for Consumer Affairs;  
“**retail shop**” means a business in which goods are sold, or services  
are provided, to the public;  
“**retail tenancy**” means a lease of premises, or of premises together  
with any chattels or other property associated with a business  
15 undertaking, entered into for the purpose of a retail shop that is to be  
run by the lessee on the premises;  
“**retail tenancy agreement**” means an agreement that creates a retail  
tenancy, together with any associated guarantee and any collateral or  
associated agreement or arrangement;  
20 “**Tribunal**” means the Commercial Tribunal of New South Wales.

**PART 2—APPLICATION OF CONTRACTS REVIEW  
ACT 1980**

**Application of Contracts Review Act 1980 to retail tenancy  
agreements**

- 25 4. (1) Section 6 of the Contracts Review Act 1980 does not preclude  
any grant of relief under that Act in relation to a retail tenancy agreement.  
Such relief may even be granted to a lessee that is a corporation, but  
nothing in this section otherwise affects the operation of section 6 (1) of  
that Act.
- 30 (2) The Contracts Review Act 1980 applies to a retail tenancy  
agreement even if the agreement purports to be governed by a law other  
than the Law of New South Wales, and regardless of where the agreement  
was entered into.



**Tribunal may exercise certain powers**

5. The jurisdiction and powers of the Supreme Court under the Contracts Review Act 1980 may also be exercised, in respect of a retail tenancy agreement, by the Tribunal on application made to it in accordance with the rules of the Tribunal. The Tribunal has jurisdiction and powers accordingly.

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**This Act to be read with Contracts Review Act 1980**

6. (1) This Act is to be read with and construed as part of the Contracts Review Act 1980, and provisions of that Act that apply to or in consequence of the making of any order or the exercise of jurisdiction by the Supreme Court under that Act extend to apply in relation to any orders made or jurisdiction exercised under that Act by the Tribunal in accordance with this Act.

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(2) An order made by the Tribunal by virtue of this Act is to be complied with, and may be enforced, as if it were an order made by the Supreme Court.

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(3) For the purposes of the exercise by the Tribunal of power under the Contracts Review Act 1980, references in that Act to rules of court are to be construed as references to rules of the Tribunal.

**When application may be made to Tribunal**

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7. (1) Section 16 of the Contracts Review Act 1980 does not apply in respect of an application for relief made to the Tribunal, but an application to the Tribunal may be made only within 3 years after:

- (a) the date on which this Act commences; or
- (b) the date of the retail tenancy agreement to which the application relates,

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whichever is the later date.

(2) An application may be made even though the agreement to which the application relates has been discharged.

**PART 3—RETAIL TENANCY AGREEMENTS**

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**Division 1—Regulation of retail tenancy agreements****Term of tenancies**

8. (1) The term of a retail tenancy agreement must be not less than 5 years, but this only applies to the lessee's first lease of the premises.

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(2) A term of less than 5 years is permissible if a barrister or solicitor or a court of a State or Territory who is not acting for the lessor certifies in writing that the lessee has indicated to him or her that the lessee waives the right to a 5-year term.

- 5 (3) In determining what the term of a lease is, any further term available under the lease at the option of the lessee is to be considered to be part of the term of the lease.

**Renewal of tenancies**

10 9. (1) The lessee under a retail tenancy agreement may, by notice to the lessor not less than 4 months prior to the date on which the first lease of the premises expires, indicate the lessee's desire to renew the lease for a further term not less than 2 years and not greater than the term of the existing lease, commencing on the date of expiration of the existing term.

15 (2) The lessor must not unreasonably refuse to renew the lease subject to there being no substantial breach of which notice has been given in writing by the lessor during the term.

(3) This section does not apply to a retail tenancy:

- (a) that is a periodic tenancy or a tenancy at will or a tenancy for a term not exceeding 6 months; or  
20 (b) that contains an option to renew the tenancy.

**Key money etc. prohibited**

25 10. (1) A lessor under a retail tenancy agreement must not seek or accept any premium, non-repayable bond or other money or benefit that is to be paid or assigned to or at the direction of the lessor or lessor's agent in connection with the grant, renewal or assignment of the retail tenancy.

30 (2) A requirement by a proposed lessor in connection with the grant, renewal or assignment of a retail tenancy that the proposed lessee refurbish or refit the premises to be leased is to be considered for the purposes of this section as a benefit that is to be paid to the lessor in connection with the grant, renewal or assignment of the retail tenancy.

**Conditions concerning refurbishment**

35 11. (1) A lessor under a retail tenancy agreement must not require the lessee to refurbish or refit the leased premises except in accordance with the terms of the agreement.

(2) A retail tenancy agreement must not contain any provision the effect of which is to require the lessee under the agreement to refurbish or

refit the leased premises unless the provision indicates the general nature and timing of the refurbishment or refit required and is reasonable in the circumstances.

(3) This section does not prevent the agreement from containing a provision the effect of which is to require the lessee to keep the leased premises in good order and condition. 5

#### **Lessee to be given notice of significant alteration and refurbishment**

12. (1) The lessor under a retail tenancy agreement must notify the lessee in writing of any proposed alteration to or refurbishment of the building or retail shopping centre of which the retail premises form part that is likely to affect the lessee in the conduct of his or her business at the retail premises. 10

(2) The notification must be given in writing at least 2 months before the commencement of the alteration or refurbishment unless a shorter period of notice is necessitated by an emergency situation or causes outside the control of the lessor or a shorter period is agreed to by the lessee in the terms of the agreement. 15

#### **Inadequate sales clause**

13. A retail tenancy agreement must not contain a provision the effect of which is that the agreement is terminated, or can be terminated at the option of the lessor, if the lessee fails to achieve a certain level of turnover. 20

### **Division 2—Enforcement of requirements of this Part**

#### **Orders on application of lessee**

14. (1) A lessee under a retail tenancy agreement may apply to the Tribunal for an order under this section. 25

(2) On an application under this section the Commercial Tribunal may, if satisfied that a person has contravened a provision of this Part, order the person to do either or both of the following:

- (a) discontinue the contravention; 30
- (b) take specific action to rectify or redress the consequences of the contravention.

(3) Action that the Commercial Tribunal may order to be taken under subsection (2) (a) includes:

- the payment of compensation 35

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- the payment of money paid to the lessor in contravention of this Part
  - reimbursement for other benefits received by the lessor from the lessee in contravention of this Part.
- 5 (4) In proceedings before the Commercial Tribunal under this section, a certificate, purporting to have been signed by the Commissioner and certifying as to the granting of consent to the application, is evidence of that consent.
- 10 (5) If the Commercial Tribunal is satisfied that a contravention to which an application under this section relates was by a body corporate and occurred with the consent contravention, was a director of the body corporate or a person concerned in its management, the Commercial Tribunal may make, in addition to any other order:
- 15 (a) an order prohibiting the person from continuing to consent to, or connive at, the contravention; or
- (b) an order prohibiting the person from consenting to, or conniving at, a like contravention by any other body corporate or which the person is a director or in the management of which the person is concerned.
- 20 (6) An order under this section may be subject to such conditions (whether as to the duration of the order or otherwise) as the Commercial Tribunal thinks fit including:
- 25 (a) conditions as to the future conduct of the person affected; and
- (b) conditions specifying the action to be taken by the person to rectify the consequences of the contravention the subject of the application under this section.

**Variation or discharge of orders**

15. The Commercial Tribunal may, on the application of the Commissioner, the person on whose application the order was made or
- 30 any person against whom the order was made, vary or discharge an order made under this Part.

**Injunctions**

16. (1) The Supreme Court may grant an injunction in such terms as the Court determines to be appropriate if satisfied, on the application of
- 35 the Commissioner with the consent of the Minister, that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of an order of the Commercial Tribunal under this Part.

(2) An injunction under this section may be granted as an interim injunction without an undertaking being required as to damages or costs or may be granted as a permanent injunction.

#### **PART 4—MISCELLANEOUS**

- Jurisdictional overlap** 5
17. (1) The Commercial Tribunal has no jurisdiction to hear or determine an issue arising under an application made to it under this Act:
- (a) if the issue is the subject of a dispute in proceedings before a court, unless those proceedings have been stayed under this section;
  - (b) if the issue has been decided by a court in proceedings in which the issue was in dispute. 10
- (2) A decision by a court is to be disregarded for the purposes of subsection (1) if:
- (a) a court of record has, on judicial review, quashed or declared invalid the decision, or the proceedings in which it was made, on the ground that the court had no jurisdiction to hear and determine the issue; or 15
  - (b) the decision has been otherwise overturned.
- (3) If a court before which proceedings are pending becomes aware that an issue that is the subject of a dispute is the proceedings is an issue arising under an application to the Commercial Tribunal under this Act, the court may stay the proceedings if it is of the opinion that the issue would be more appropriately determined by the Commercial Tribunal under this Part. 20
- (4) In this section: 25
- “**court**” means a court, tribunal, board, or other body or person authorised by law, or by consent of parties, to decide or resolve, whether through arbitration or conciliation or other means, any issue that is in dispute.
- Saving** 30
18. This Act has no effect in relation to an agreement entered into before the commencement of this Act.
19. A retail tenancy agreement must comply with the provisions of the Retail Tenancy Leases Code of Practice as set out in Schedule 1.
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**SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE**

(Sec. 19)

**PART 1—DEFINITIONS AND APPLICATION**

5 In this Code:

“**ACT**” means the *Retail Tenancies Review Act 1993*.

“**CODE**” means the *Retail Tenancy Leases Code of Practice*.

10 “**RETAIL SHOPPING CENTRE**” means a cluster of 5 or more retail premises all of which have, or if leased would have, a common owner or head lessor.

“**DISCLOSURE STATEMENT**” is any document providing the information prescribed in Annexure A.

“**MEASUREMENT**” under this Code means as measured using the BOMA Method of Measurement (1989 Revision).

15 “**REGISTRAR**” means the persons occupying the positions of the Executive Director of the NSW Division of the Building Owners and Managers Association of Australia Ltd, and the Assistant Director, Commercial Services of The Retail Traders’ Association of NSW.

**Application**

20 1. This Code applies to all retail premises, whether or not located in a retail shopping centre, except;

(1) those operated by the lessor; or

25 (2) retail premises having a lettable area of 1,000 square metres or more measured in accordance with the BOMA Method of Measurement (1989 Revision);

(3) where the principal business is provision of financial or insurance services; or

(4) where the principal business is provision of professional services in an office or surgery environment.

30 (i) For the purposes of sub-clause d., barbers, beauticians, beauty therapists, hairdressers, optometrists and pharmacists are regarded as providing professional services in a retail shop environment that come within the application of this Code.

35 (ii) For the purposes of sub-clause d., accountants, acupuncturists, architects, chiropractors, consulting engineers, dentists, oral surgeons, dental technicians, doctors, radiologists, pathologists, physiotherapists, solicitors,

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**SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued***

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- business consultants, drafting services, real estate offices, stock and share brokers, and tax agents are regarded as providing services in an office or surgery environment and are excluded from the application of this Code.
- (5) motor vehicle service stations; or
- (6) licensed premises in hotels; or
- (7) retail premises operated within and by the operator of premises where the principal business is the operation of cinemas, bowling alleys or skating rinks. 10
2. The provision of Part 3 apply only to retail premises within a retail shopping centre.
3. This Code applies to all agreements to lease and all leases of retail premises executed by the lessee on or after the commencement date of the Act. 15
4. Provisions of existing leases and agreements to lease remain paramount until their expiry.
5. Any variation to an existing lease or agreement to lease executed on or after the commencement date of the Code must comply with the Code. 20
6. Where an existing lease contains an option, the Code will not apply to the new lease resulting from the exercise of the option.
7. Where there is an existing agreement to lease, the Code will not apply to the resulting lease.
8. In the event of any conflict between a provision of the Code and; 25
- (1) any provision of a lease entered into prior to the commencement date of the Code, or
- (2) any written or otherwise provable agreement made prior to the commencement date of the Code to vary a lease,
- the provisions of the lease or variation will prevail. 30

**PART 2—REQUIREMENTS APPLICABLE TO ALL RETAIL PREMISES**

**Negotiations of Leases**

9. All representations made or disclosed by one party to the other must be accurate, truthful and without omission of any matter material at the relevant time. 35

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued*

10. A copy of the form of the proposed lease must be provided to the lessee as early as practicable in the negotiations.

**5 Disclosure Statement**

11. A disclosure statement must be given to a prospective lessee at least 7 days before any agreement to lease or lease is signed by the lessee and returned to the lessor or the lessor's solicitor or agent. The information required to be included in a disclosure statement must include the particulars set out in the form attached as Annexure A.

12. A prospective lessee must not be committed to an initial lease for the specified retail premises until the lessor has provided the lessee with a disclosure statement required by clause 11.

13. A lessee must not be committed to a subsequent lease of the same retail premises until the lessor has provided a current disclosure statement or a statement of any variations from the original disclosure statement.

14. The disclosure statement and lease must state what fixtures, fittings, equipment and services will be provided by each of the parties, who will be responsible to maintain, repair or replace them, and who will own them on the termination of the lease.

15. The disclosure statement must show in general terms the existing and proposed tenancy mix and a floor plan showing the location of common areas and kiosks. The tenancy mix and floor plans may change and the statement can only be accurate as at the date given.

16. The disclosure statement must contain full details of any undertakings given in relation to exclusivity or limitations on competing uses agreed between the parties.

17. A lease must provide that if a disclosure statement is not given to a lessee or if a disclosure statement or variation to a disclosure statement given to a lessee is misleading, contains false information or does not contain all the required information, the lessee may give the lessor a written notice of termination at any time within 3 months after the date of commencement of the lease except that;

(1) the lessor may contest the termination on the grounds that it has acted honestly and reasonably and ought fairly to be excused for the contravention and that the lessee is substantially in as good a position as the lessee would have been if there had been no contravention; and



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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

(2) the termination of a lease in accordance with a notice of termination by the lessee does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the lease before the date of termination unless the lessor and lessee otherwise agree. 5

18. The lessee must not be required to contribute towards the cost of any fixtures, fittings, equipment and services which are not prescribed in the lease and the disclosure statement. 10

**Lease Costs**

19. The account presented to the lessee for lease preparation must be a true copy of the account presented to the lessor and be reasonable in amount.

20. Where a prospective lessee gives written authority for preparation of a lease, the lessor may require a provision in the written authority that if the prospective lessee withdraws from lease negotiations the lessee is responsible for the costs of lease preparation. 15

**Lease Documentation**

21. A lessor must submit the lease for; 20

- (1) stamping within 1 month of return of the lease to the lessor or the lessor's solicitor or agent duly executed by the lessee; and
- (2) where applicable, registration within 1 month of return of the stamped lease from the Office of State Revenue duly stamped.

22. A lessor must provide the lessee with an executed copy of the lease within 1 month after return of the lease from; 25

- (1) the Office of State Revenue to the lessor or the lessor's solicitor or agent, duly stamped or;
- (2) where applicable, the Land Titles Office to the lessor or the lessor's solicitor or agent, duly registered. 30

23. The periods prescribed in clauses 21 and 22 shall be extended for delays caused by head lessors or mortgagees.

**Rental Calculations**

24. A lease must provide that rental takes one of the following forms; 35

- (1) "gross rentals", where the lessor pays all outgoings;

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

- (2) “net rentals”, where the outgoings are shared between lessor and lessee; or
- 5 (3) “net net rentals”, where all outgoings are charged to the lessee.
25. Where a lease provides for an adjustment of base rental during the lease term, the lease must state the method by which the base rental is to be adjusted on each occasion. Only one of the following methods may be used at each adjustment.
- 10 (1) adjustment in proportion to the consumer price index (All Groups Sydney) or other agreed consumer price index issued by the Australian Bureau of Statistics; or
- (2) by an agreed percentage; or
- 15 (3) by a pre-agreed amount or formula (other than a formula combining any of the methods specified in subclauses (1), (2), (3) or (4)); or
- (4) at current market rental.
26. Only one method must be used during any 12 months period but a lease may specify different methods for each separate 12 months period
- 20 during the term of the lease.
27. A lease must not contain provisions which permit adjustment of the base rental by:
- 25 (1) using more than one of the methods specified above and setting the reviewed rental as the highest rental which is produced by one of the methods used (whether use of more than one of such methods occurs before, at or after the date the base rental is reviewed); or
- (2) reserving a discretion to apply one of the methods specified above.
28. A lease must not provide for rental to be reviewed to market more frequently than once in any 12 months period.
- 30 29. A lease that specifies adjustment at current market rental must provide that disputes above rental levels at the time of a market review during the term of a lease are to be determined by an independent valuation.
- 35 30. For the purposes of clause 29, an independent valuation is made by:
- (1) a valuer acting as an expert. The selection of the valuer must be made by an impartial third party; or

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

- (2) two valuers, one being selected by each party. If the two valuers cannot agree the matter is settled by a third valuer chosen by the two valuers or by an impartial third party. 5
31. Valuers appointed pursuant to the provisions of a lease required by clause 29 must be independent of the parties and require to undertake the valuation on the following basis.
- (1) Rentals must be determined on the basis of the use which is permitted under the lease. Among the matters to be considered by the valuer are rental concessions and other benefits being frequently and normally offered to prospective lessees of unoccupied retail premises. 10
- (2) Valuers must consider all available documentation affecting each lease transaction, and not be confined to the terms of leases. 15
- (3) Valuation fees must be shared equally between the parties.
- (4) Valuations must be speaking valuations.
- (5) Valuers must ignore any value attached to goodwill created by the lessee's occupation or to lessee's fixtures and fittings on the retail premises. 20
32. Where a base rental is charged, a turnover rental may also be charged.
33. If the parties agree to calculate rent as a percentage of turnover, it must be calculated excluding the following items;
- (1) losses incurred in the resale or disposal of goods reasonably and properly purchased from customers as trade-ins in the usual course of business; 25
- (2) deposits and instalments received on account of lay-bys, hire purchase or credit sales, which are refunded to a customer;
- (3) refunds on merchandise or services the cost of which have been included in "Gross Receipts"; 30
- (4) services, finance or interest charges payable by the lessee to any financier in connection with provision of credit to customers (other than commissions on credit or store cards);
- (5) the exchange of merchandise between shops of the lessee where such exchange is made solely for the convenient operation of the business of the lessee and not for the purpose of consummating a sale made at, in, from or upon the retail premises; 35
- (6) returns to shippers, wholesales or manufacturers;

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

- (7) sales of the lessee's fixtures and fittings after their use in the conduct of the business at or from the retail premises;
- 5 (8) discounts allowed to customers in the normal course of business;
- (9) uncollected credit accounts written off;
- (10) purchase, receipt or other similar tax imposed on the purchase price or cost of hire of merchandise or services at the point of sale (i.e., a value added tax or similar);
- 10 (11) delivery charges; and
- (12) sales of lottery and like tickets (other than commissions).
34. Underpayment or overpayment of turnover rentals must be adjusted annually.
35. A lease must not contain a provision;
- 15 (1) which prohibits; or
- (2) the effect of which is to prohibit or allow the prohibition of a decrease in rental;
- nor shall any agreement, arrangement or understanding (whether legally enforceable or not) containing such provision be entered into by the
- 20 parties.
36. Unless otherwise agreed, rental and outgoings are to commence from the date of handing over possession with all finishes provided by the lessor, as specified in the lease, in place and operative.
- 25 37. The parties may agree to a special rent, in addition to all other rentals to cover the cost of fitout or fixtures, fittings and equipment installed by the lessor at the lessor's cost at the request of the lessee.

**Recovery of Outgoings**

38. A lessor may recover outgoings to the extent that the lease permits. Where outgoings are recoverable, a lease must state in detail which
- 30 outgoings are recoverable and the method to be used for calculating that part of the outgoings to be met by the lessee.
39. Any outgoings not specified in the lease as recoverable must be absorbed by the lessor.
- 35 40. Lessees will not be expected to meet the capital costs of structure or common area but must meet capital costs in respect of the tenancy in excess of what the lessor will supply.

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

41. Depreciation is not recoverable by the lessor from the lessee.
42. Provisions for the funding of major items of repair and maintenance may be charged as outgoings, provided that the funds are set aside in an interest bearing account for use only for the purposes specified. Interest earned on these funds must accrue to the provision account or accounts. 5
43. Land tax on a single holding basis, council rates and water rates may be recovered as outgoings. 10
44. The lessor will meet any outgoings from vacant tenancies or the shortfall from concessions allowed to any lessee.
45. The lessor must give the lessee a detailed outgoings budget at least 1 month before the start of each accounting year as used by the lessor or prior to the lease commencement date as is appropriate. 15
46. The lessor will make available for lessees' perusal an unaudited outgoings expenditure statement within 1 month of the end of each 6 months of the lessor's accounting year.
47. A Registered Company Auditor will be appointed by the lessor to provide a report for lessees within 3 months of the end of each accounting year containing a statement prepared in accordance with Australian Accounting Standards showing outgoings have been properly charged and the manner in which they have been expended. The report should state whether the amounts recovered from lessees as provided in clause 38 do or do not exceed the amount incurred by the lessor. 20  
25
48. A lessor must not recover in any year in relation to any outgoing more than has been properly included as an outgoing in that year and/or as provided in clause 38 directly in the operation and management of the retail premises and the retail shopping centred in which they are located.
49. The proportion of outgoings, not specifically the responsibility of any lessee, to be paid by a lessee of a retail premises must not exceed the ratio of the lettable area of the relevant tenancy to the lettable area of all lettable retail premises in the retail shopping centre enjoying or sharing the benefit of a particular outgoing. 30

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

**Exercise of Options at Current Market Rental**

50. Where an option is to be exercised at current market rental no less  
5 than 6 months nor no more than 9 months before the expiry of the time to  
exercise the option, the lessee may make a written request to the lessor to  
state the rent to apply from the commencement of the new term.
51. If so requested, the lessor must give written notice of the amount  
10 of the new rental not less than 4 months prior to the expiry of the time to  
exercise the option.
52. Within 1 month of receipt of the lessor's notice, the lessee may  
notify the lessor that it exercises the option;
- (1) at the rental proposed or as otherwise agreed between the lessor  
and lessee; or
- 15 (2) requires the rental to be determined in accordance with clause 54.
53. A lease that permits the exercise of an option at current market  
rental must provide that disputes about rental levels are to be determined  
by an independent valuation. For the purposes of this clause, an  
independent valuation is made by;
- 20 (1) a valuer acting as an expert. The selection of the valuer must be  
made by an impartial third party; or
- (2) two valuers, one being selected by each party. If the two valuers  
cannot agree the matter is settled by a third valuer chosen by the  
two valuers or by an impartial third party.
- 25 54. Valuers appointed pursuant to the provisions of a lease in  
accordance with clause 53 must be independent of the parties and  
required to undertake the valuation on the following basis;
- (1) Rentals must be determined on the basis of the use which is  
30 permitted under the lease. Among the matters to be considered by  
the valuer are rental concessions and other benefits being  
frequently and normally offered to prospective lessees of  
unoccupied retail premises.
- (2) Valuers must consider all available documents affecting each lease  
transaction, and not be confined to the terms of leases.
- 35 (3) Valuation fees must be shared equally between the parties.
- (4) Valuations must be speaking valuations.

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

- (5) Valuers must ignore any value attached to goodwill created by the lessee's occupation or to lessee's fixture and fittings on the retail premises. 5
55. If the lessor fails to state a rental within the time allowed under clause 51 then at the date 3 months prior to expiry of the lease the lessee will be deemed to have given notice requiring the rental to be fixed in accordance with clause 53.
56. If the lessor fails to initiate action under clause 53 within 2 weeks of the date of receipt of the lessee's notice under clause 52 (2) or deemed notice under clause 55, the lessee may initiate such action within a period of 1 further week. 10
57. Within 1 week of the receipt of a notice of the rental determined under clause 53 the lessee must exercise the option at that rental or the option must lapse. 15
58. If a lessee has complied with these procedures and the date for the exercise of the option has passed before the rental has been determined the date for exercise of the option will be deferred until 1 week after the lessee has received notice of the new rental but not later than 1 month prior to the expiry of the lease. 20
- Compensation**
59. If the lessor;
- (1) inhibits access of a lessee to the retail premises in any substantial manner; or 25
- (2) takes any action that would substantially alter or inhibit the flow of customers to the retail premises; or
- (3) causes or fails to make reasonable efforts to prevent or remove any circumstances that can reasonably be influenced by the lessor which affect the lessee's trading adversely; or 30
- (4) fails to have rectified as soon as practicable any breakdown of plant or equipment under the lessor's care and maintenance which breakdown causes loss of profits to the lessee; or
- (5) in relation to a retail shopping centre neglects to adequately clean, maintain or repair the retail shopping centre including common areas; 35
- and the lessor does not rectify the matter within a reasonably practicable time after receiving from a lessee a written notice asking the lessor to do

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued*

5 so, then the lessor is liable to pay the lessee reasonable compensation for any loss or damage (other than nominal damage) suffered by the lessee as a consequence.

10 60. A lease must not limit liability for compensation in circumstances stated in clause 59 unless prior to the execution of the lease, possible disturbance to the lessee's quiet enjoyment during the term or currency of the lease shall have been brought to the lessee's attention by the lessor and a clause in the lease expressly specifies a formula for compensation in the event of such disturbance occurring.

61. Enlargement of a retail shopping centre or a change in its tenancy will not, of itself, justify claims for compensation by lessees.

**Demolition**

15 62. Where a lease provides for termination of the lease on the ground of intended demolition, a demolition clause must not be invoked unless the lessor produces firm proposals for the demolition which directly or indirectly affect the tenancy concerned.

20 63. At least 6 months notice must be given of the termination of a lease under a demolition clause.

25 64. A lease must not limit liability for the lessor to be liable to pay the lessee damages if, where a lease has been terminated under a demolition clause, it can be shown that the clause was invoked dishonestly or maliciously to gain early termination of the lease and not for bona fide demolition proposals.

65. Where notice of termination of a lease has been given due to the operation of a demolition clause, a lessee may terminate the lease on 7 days written notice to the lessor at any time within 6 months prior to the termination date notified by the lessor.

30 **Damaged Premises**

66. Rental and outgoings are not payable if the retail premises are unusable or inaccessible due to damage, unless the lessee was responsible for the damage or contributed to the damage (other than in a nominal way) or for actions affecting the lessor's insurance.

35 67. If either party is responsible for causing the damage, compensation may be payable to the other and a lease must not limit such liability.



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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

68. If damaged retail premises are useable a lessee must continue to trade, but the rental and outgoings will be reduced in proportion to the nature and extend of the damage. 5

69. If a lessor considers rebuilding is impracticable or undesirable the lessor, within 7 days of making such conclusion, notify the lessee by written notice of the lessor's conclusion, and afterwards either party may terminate the lease and no compensation will be payable.

70. The lessee cannot terminate the lease if the lessee has been responsible for the damage or contributed to the damage (other than in a nominal way), or for actions affecting the lessor's insurance. 10

71. If, after a written request from the lessee, a lessor fails to reinstate damaged retail premises within a reasonable time the lessee may terminate the lease. 15

72. The parties may, by written agreement, terminate the lease other than in the manner prescribed in clauses 66 to 71.

**Employment restriction**

73. The lease must not in any way limit the lessee's freedom to employ contractors or staff provided that the lease may do one or more of the following; 20

- (1) specify minimum standards of competence; or
- (2) prohibit work from being carried out on or to specified items of the lessor's property; or
- (3) require lessees to conform with any construction site agreement or other industrial award affecting the retail shopping centre. 25

**Refurbishment of Retail Premises**

74. A lessor and lessee may agree to refurbishment or refitting as a requirement on assignment or renewal of a lease.

**Assignment and Sub-leasing** 30

75. A lessor reserves the right to refuse an assignment of a lease which right will not be unreasonably withheld.

76. Applications for assignments will be handled expeditiously if adequate information as to the financial standing and trading experience of prospective assignees and guarantors, if required, is included. 35

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued*

5 77. Lessors must advise approval or abjection within 42 days of receipt of the application by the lessee. If no objection is made within that period, the lessor shall be deemed to have given approval to the application.

10 78. Before applying for approval of the lessor to a proposed assignment, a lessee must furnish the proposed assignee with a copy of the disclosure statement and any variation in the conditions and terms of operation of the retail shopping centre or retail premises which may have occurred during the expired term of the lease.

15 79. A lessor may withhold consent to the assignment of a lease if;  
(1) the proposed assignee proposes to change the use of the retail premises;  
(2) the proposed assignee does not have financial resources or retailing skills comparable with those of the assignor;  
(3) the proposed assignee has not been provided with a copy of the disclosure statement and any variations to the lease.

20 80. A lessor is entitled to recover the reasonable costs of investigating assignees and processing assignments but at the request of the lessee must substantiate those costs.

25 81. If a lessor has an option to buy out a lease, the lease must state the time (not more than 3 months) from the date when the lessee advises the lessor that the lease may be purchased within which the option must be exercised and the method for setting the price.

82. Subject to clause 80 a lessor must not claim any sum of money or other consideration from a lessee in return for consent to the assignment of the balance of the term of a lease.

30 83. Clause 82 does not prevent a lessor and a proposed assignee agreeing to a rent review, refurbishment or refitting in the event of an assignment or to the proposed assignee entering into a new lease.

35 84. A lessor may reserve the right to refuse in its absolute discretion an application for a lessee to grant a subtenancy, licence or concession or for the lessee to part with possession of the retail premises or any part of the retail premises.

85. A lessor may refuse in its absolute discretion an application by a lessee to mortgage or otherwise encumber its estate or interest in a lease.

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

**Termination and Renewal of Leases**

86. Not less than 4 months prior to the expiry of a lease, the lessor must give notice to the lessee in writing; 5

- (1) of the conditions on which it is prepared to renew the lease; or
- (2) that the lease will not be renewed; or

- (3) that the lessee will be able to remain as a periodical tenant under the terms of the lease; or

- (4) if there were no holding over provisions, on a monthly tenancy for the time being on terms to be agreed. 10

87. The period of notice required by clause 86 is minimum. For lessees having occupancy of more than 4 years, the period of notice must be increased by 1 month of each year of occupancy over and above 4 years up to a maximum of 12 months. 15

88. Within 1 month of the receipt of a notice under clause 86 (1) the lessee should give notice to the lessor in writing that;

- (1) it accepts the conditions for the renewal; or

- (2) it wishes to negotiate the conditions, stating the alterations to the conditions it seeks; or 20

- (3) it does not wish to renew.

89. Within 1 month of the receipt of a notice under clause 86 (3) the lessee should give notice to the lessor in writing whether it agrees to the continuation of the lease as proposed.

90. If the lessor fails to provide the information set out in clause 86 the term of the lease may, at the lessee's option (exercisable by written notice within 2 weeks after the last date the notice in clause 86 should have been given) be extended so that before being required to vacate the retail premises, the lessee has this information for a period of not less than that required under clause 87. 25  
30

91. If the lessee fails to give the notice required under either clause 88 or clause 89 the lessor may assume that the lessee does not wish to renew.

**Security deposits**

92. Security deposits provided by the lessee must be held by the lessor in the name of the lessee in an interest bearing account. Interest accrues to the lessee and must not be appropriated by the lessor except in cases of default by the lessee. 35

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued*

93. Bank guarantees reasonably acceptable to the lessor will be acceptable in lieu of security deposits.

**5 Independent Legal Advice**

94. A lessee must not be compelled to use a lessor's solicitor.

**PART 3—ADDITIONAL REQUIREMENTS FOR RETAIL PREMISES IN RETAIL SHOPPING CENTRES**

**Management Information**

10 95. Where a lease provides that monthly turnover figures be supplied  
by a lessee they must be treated as confidential, except that lessors will  
make available on request by a lessee monthly figures consolidated in  
such a form that individual components cannot be identified. Nothing in  
15 this clause shall prohibit the lessor from disclosing the monthly turnover  
figures for financial or valuation purposes.

96. Where the costs of obtaining traffic counts or other statistical information are charged to lessees, the resulting reports must be made available to those lessees.

**Advertising and Promotion**

20 97. Where lessees are levied advertising and promotion charges a  
lessor must present an annual marketing plan including a budget to a  
general meeting of lessees at least 1 month before the start of an  
accounting year and prior to the imposition of the charges.

25 98. The lessor will make available for lessees' perusal an unaudited  
advertising and promotion expenditure statement within 1 month of the  
end of each 6 months of the lessors' accounting year.

30 99. A Registered Company Auditor will be appointed by the lessor to  
provide a report for lessees within 3 months of the end of each  
accounting year containing a statement prepared in accordance with  
Australian Accounting Standards showing advertising and promotion  
levies received have been properly charged and the manner in which they  
have been expended.

35 100. Any money collected from lessees as advertising and promotion  
charges which are not expended in the current year will be retained in the  
marketing fund for the benefit of lessees.

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

101. A lessor may choose to make a contribution from the lessor's own funds to advertising and promotion.
102. Payment for advertising and promotion may be required of lessees at the same time as payment for rent. Any adjustments will be made in the ensuing year's budget. 5
103. Where a levy is struck for an opening promotion the budget must be presented to contributors prior to the event.
104. All lessees must contribute to any fund set up for advertising and promotion. Subject to clause 117 there must be no compulsion for a lessee to undertake any further advertising of its business additional to its contribution to advertising and promotion. 10
- Relocation**
105. A relocation clause will be invoked only on presentation of current plans for refurbishment, redevelopment or extension of the retail shopping centre which directly or indirectly affect the retail premises concerned. 15
106. A lease must not contain a provision;
- (1) which prohibits, excludes, modifies or limits; or 20
  - (2) the effect of which is to prohibit, exclude, modify or limit, the effect of clause 105.
107. A relocation clause must;
- (1) provide at least 3 months notice of the date for relocation including an offer of alternative retail premises and the terms and conditions on which they are offered; 25
  - (2) include the right of the lessee to terminate the lease if the alternative retail premises or the terms or conditions of such offer are not acceptable;
  - (3) provide for the issue of a new lease if the alternative retail premises are acceptable, such lease to be on the same terms as the existing lease except for such items as commencement date and rentals, and; 30
  - (4) provide for the lessor to pay the lessee's reasonable costs of the relocation, including, unless otherwise agreed, legal costs.
108. Nothing in clauses 105 to 107 will prevent the parties from negotiating a new lease as an alternative to relocation. 35

*Retail Tenancies (Code of Practice) 1993*

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued*

**Geographical Restrictions**

5 109. A lessee must not be prohibited from opening shops away from a retail shopping centre, either during or after expiry of the lease, so long as the name of the retail shopping centre is not applied to any of those shops.

110. A lease must not contain a provision;

(1) which prohibits, excludes, modifies, or limits: or

10 (2) the effect of which is to prohibit, exclude, modify or limit, the effect of clause 109.

**Tenants Association**

111. Lessees must not be prohibited from joining a tenants association or other similar body.

15 112. A lease must not contain a provision;

(1) which prohibits, excludes, modifies, or limits; or

(2) the effect of which is to prohibit, exclude, modify or limit, the effect of clause 111.

20 113. Lessors should encourage lessees to become involved in the formation of marketing advisory panels and to seek advice from them on marketing.

**Trading Hours**

114. A lessor will set the trading hours in a new retail shopping centre.

25 115. A lessor must not change trading hours in a retail shopping centre without the approval of a majority of lessees on the basis of one vote per tenancy.

116. A lessor may agree to lessees trading outside accepted trading hours if those lessees meet the costs of opening the retail shopping centre for the additional hours.

30 117. A lease may require lessees who do not conform with the trading hours to make specified additional contributions to the advertising and promotional funds. This clause does not prevent a lease making provision for other action in the event of a lessee not trading in accordance with agreed requirements.

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

**Disputes**

118. Disputes or differences arising between the parties under or in connection with the Code must in the first instance be settled, if possible, by negotiation between the parties in good faith. 5

119. If by negotiation the parties fail to reach agreement then either party may make a written application to a Registrar to resolve the dispute. Should this attempt to resolve the dispute be unsuccessful, a mediator will then be appointed jointly by the Registrars to attempt to mediate the dispute. The parties must attend the mediation proceedings. 10

120. If by mediation the parties fail to reach agreement, then either party may make a written application to the Registrar to appoint an independent expert to determine the dispute.

121. If the dispute is submitted to an independent expert referred to in clause 120; 15

- (1) the parties must attend any proceedings;
- (2) any process or determination of the dispute must be made as an expert and not as an arbitrator and will be final and binding on the parties without appeal so far as the law allows; 20
- (3) the expert must determine the rules for the conduct of the determination; and
- (4) each party must pay its own costs incurred in connection with the determination. Other costs including costs incurred jointly must be paid by the parties equally unless otherwise awarded by the expert. 25

122. The parties agree that if mediation or expert determination has been commenced and not completed no other form or method of dispute settlement may be run concurrently.

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SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued*

**Annexure A**

**DISCLOSURE STATEMENT**

5

**ADVICE TO LESSEES**

1. Before signing agreements to lease or leases, lessees should ensure they fully understand the documents.

2. If there is any doubt, lessees should seek independent legal advice.

NOTE: Where there is insufficient space on this form, please attach additional sheets.

10

**TENANCY DETAILS**

Address of Retail premises/Shop No.      Lettable Area (sq.m.)

Permitted Use of Retail Premises

Lease Period	Options		Option Periods
/ /19 to / /19	No	Yes	

15 Finishes to be provided by the lessor.

Hours of access to retail premises outside trading hours.

Date on which retail premises will be available for occupation by the lessee.

Lessor's requirements as to quality and standard of fittings in retail premises.



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**SCHEDULE 1—RETAIL TENANCY LEASES CODE OF PRACTICE—*continued***

Rent:

Method for Calculating Rent:

- |                      |           |        |   |
|----------------------|-----------|--------|---|
| 1. Commencement Date |           |        | 5 |
| 2. Formula           |           |        |   |
| 3. Rent Reviews      | Frequency | Nature |   |

**DETAILS AS TO INTEREST OF LESSOR**

Is the Lessor:

- |  |    |
|--|----|
| <input type="checkbox"/> Owner of the retail premises  | 10 |
| or   |    |
| <input type="checkbox"/> Lessee of the retail premises |    |

Give details of any rights and obligations of lessor under that lease that may affect the retail premises.

**DETAILS AS TO AGREEMENTS OR REPRESENTATIONS** 15

Give details of any other agreements between lessor and lessee, or representations made by lessor or lessee.

**DECLARATION BY LESSOR**

I acknowledge that this Disclosure Statement contains all agreements and representations that influenced me to contemplate entering into the proposed lease. 20

Name of Lessor:  
Address of Lessor:  
Signature:  
Date:

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**SCHEDULE 1—RETAIL TENANCY LEASES CODE OF  
PRACTICE—*continued***

**DECLARATION BY LESSEE**

5 I acknowledge that this Disclosure Statement contains all agreements and representations that influences me to contemplate entering into the proposed lease.

Name of Lessee:  
Address of Lessee:  
Signature:  
Date:

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