

FIRST PRINT

RETAIL TENANCIES REVIEW 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.

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.

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

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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.

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

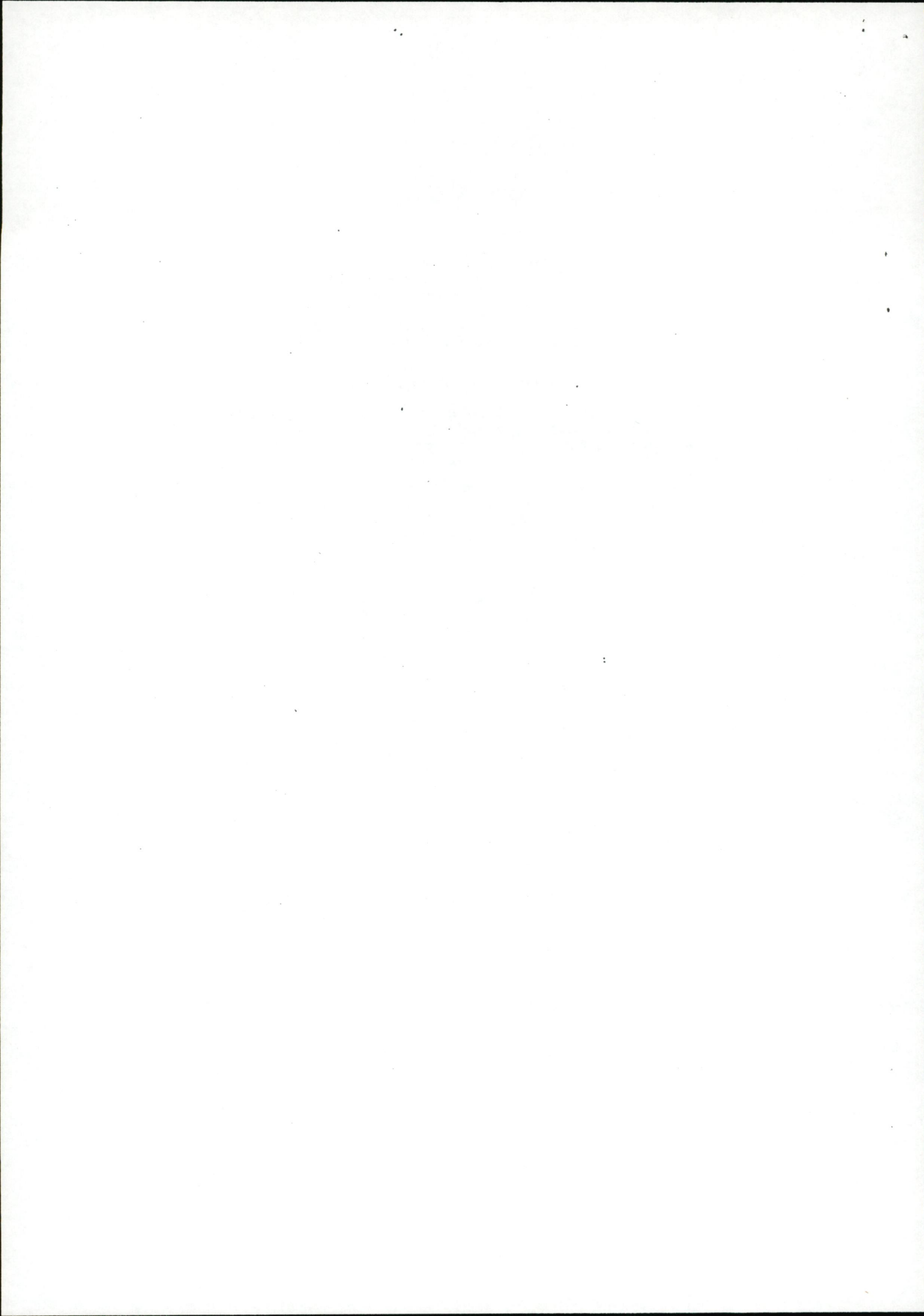
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Clause 16 enables the Supreme Court to grant an injunction for a contravention or proposed contravention of an order to the Commercial Tribunal under this Part.

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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RETAIL TENANCIES REVIEW BILL 1993

NEW SOUTH WALES



No. , 1993

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 Review Act 1993.

5 Commencement

2. This Act commences on the date of assent.

Definitions

3. In this Act:

“Commissioner” means the Commissioner for Consumer Affairs;

10 “retail shop” means a business in which goods are sold, or services are provided, to the public;

15 “retail tenancy” means a lease of premises, or of premises together with any chattels or other property associated with a business 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;

“Tribunal” means the Commercial Tribunal of New South Wales.

20 **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.

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(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

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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

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:

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- (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**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
5 years, but this only applies to the lessee's first lease of the premises.

(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.

10 (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

9. (1) The lessee under a retail tenancy agreement may, by notice to
15 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.

(2) The lessor must not unreasonably refuse to renew the lease subject
20 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

25 (b) that contains an option to renew the tenancy.

Key money etc. prohibited

10. (1) A lessor under a retail tenancy agreement must not seek or
30 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.

(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

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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

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. 5

(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. 10

(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.

Lessee to be given notice of significant alteration and refurbishment 15

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. 20

(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. 25

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. 30

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.

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(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;
- 5 (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
- 10 • 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.

(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.

(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:

- (a) an order prohibiting the person from continuing to consent to, or connive at, the contravention; or
- 25 (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.

(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:

- (a) conditions as to the future conduct of the person affected; and
- 30 (b) conditions specifying the action to be taken by the person to rectify the consequences of the contravention the subject of the application
- 35 under this section.

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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 any person against whom the order was made, vary or discharge an order made under this Part. 5

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 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. 10

(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. 15

PART 4—MISCELLANEOUS

Jurisdictional overlap

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; or 20
- (b) if the issue has been decided by a court in proceedings in which the issue was in dispute.

(2) A decision by a court is to be disregarded for the purposes of subsection (1) if: 25

- (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
- (b) the decision has been otherwise overturned. 30

(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. 35

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(4) In this section:

5 “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

18. This Act has no effect in relation to an agreement entered into before the commencement of this Act.
