

RETAIL LEASES ACT 1994 No. 46

NEW SOUTH WALES



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RETAIL LEASES ACT 1994 No. 46

NEW SOUTH WALES



Act No. 46, 1994

An Act to make provision with respect to the leasing of certain retail shops and the rights and obligations of lessors and lessees of those shops, and for other purposes. [Assented to 2 June 1994]

The Legislature of New South Wales enacts:**PART 1—PRELIMINARY**

Note. This Act applies to leases of retail shops, with certain limitations. To understand those limitations:

- * see the definition of “retail shop” in section 3 for the shops to which this Act applies;
- * see section 5 for the retail shops that are excluded from the operation of this Act;
- * see section 6 for the leases that are excluded from the operation of this Act.

Short title

1. This Act may be cited as the Retail Leases Act 1994.

Commencement

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

Definitions

3. In this Act:

“**disclosure statement**” means a statement referred to in section 11;

“**key-money**” means any money paid to or at the direction of a lessor or lessor’s agent, by way of a premium, non-repayable bond or otherwise, or any benefit that is conferred on or at the direction of a lessor or lessor’s agent, in connection with the granting, renewal, extension or assignment of a lease (and a reference in this Act to the payment of key-money includes a reference to the conferral of any such benefit);

“**lawyer**” means a barrister or solicitor;

“**lessee**” means the person who has the right to occupy a retail shop under a retail shop lease, and includes a sublessee and a lessee’s or sublessee’s heirs, executors, administrators and assigns;

“**lessor**” means the person who grants or proposes to grant the right to occupy a retail shop under a retail shop lease, and includes a sublessor and a lessor’s or sublessor’s heirs, executors, administrators and assigns;

“outgoings” means a lessor’s outgoings on account of any of the following:

- (a) the expenses of operating, repairing or maintaining the building in which the retail shop is located or (in the case of a retail shop in a retail shopping centre) of any building in the retail shopping centre or any areas used in association with any such building;
- (b) rates, taxes, levies, premiums or charges payable by the lessor because the lessor is the owner or occupier of any such building or the land on which it is erected;

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

“Registrar” means the Registrar of Retail Tenancy Disputes referred to in Part 8;

“retail shop” means premises that:

- (a) are used wholly or predominantly for the carrying on of one or more of the businesses specified in Schedule 1 (whether or not in a retail shopping centre); or
- (b) are used for the carrying on of any business (whether or not a business specified in Schedule 1) in a retail shopping centre;

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

“retail shop lease” or **“lease”** means any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop:

- (a) whether or not the right is a right of exclusive occupation; and
- (b) whether the agreement is express or implied; and
- (c) whether the agreement is oral or in writing, or partly oral and partly in writing;

Note. Section 6 limits the retail shop leases to which this Act applies.

“retail shopping centre” means a duster of premises with the following attributes:

- (a) at least 5 of the premises are used wholly or predominantly for the carrying on of one or more of the businesses specified in Schedule 1;
- (b) the premises are all owned by the same person, or have (or would if leased have) the same lessor or the same head lessor, or comprise lots within a single strata plan under the Strata Titles Act 1973;

- (c) the premises are located in the one building or in 2 or more buildings that are either adjoining or separated only by common areas or other areas owned by the owner of the retail shops;
- (d) the cluster of premises are promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade.

Note. Part 9 contains other provisions that affect the interpretation of this Act.

Notes

4 Notes included in this Act are explanatory notes and do not form part of this Act.

Certain retail shops excluded from the operation of this Act

- 5.** This Act does not apply to any of the following retail shops:
- (a) shops that have a lettable area of 1,000 square metres or more;
 - (b) shops that are used wholly or predominantly for the carrying on of a business by the lessee on behalf of the lessor;
 - (c) any shop within premises where the principal business carried on on those premises is the operation of a cinema, bowling alley or skating rink and the shop is operated by the person who operates the cinema, bowling alley or skating rink;
 - (d) premises of a class or description prescribed by the regulations as exempt from this Act.

Leases to which Act does not apply

6. This Act does not apply to any of the following leases of retail shops:

- (a) leases for a term of less than 6 months without any right for the lessee to extend the lease (whether by means of an option to extend or renew the lease or otherwise), and for this purpose a provision for holding over by the lessee at the end of the term of the lease is not considered to confer a right on the lessee to extend the lease if it operates effectively at the discretion of the lessor;
- (b) leases for a term of 25 years or more (with the term of a lease taken to include any term for which the lease may be extended or renewed at the option of the lessee);

- (c) leases entered into before the commencement of this section;
- (d) leases entered into under an option granted or agreement made before the commencement of this section;
- (e) any other lease of a class or description prescribed by the regulations as exempt from this Act.

This Act overrides leases

7. This Act operates despite the provisions of a lease. A provision of a lease is void to the extent that the provision is inconsistent with a provision of this Act. A provision of any agreement or arrangement between the parties to a lease is void to the extent that the provision would be void if it were in the lease.

When the lease is entered into

8. (1) For the purposes of this Act, a retail shop lease is considered to have been entered into when a person enters into possession of the retail shop as lessee under the lease or begins to pay rent as lessee under the lease (whichever happens first).

(2) However, if both parties execute the lease before the lessee enters into possession under the lease or begins to pay rent under the lease, the lease is considered to have been entered into as soon as both parties have executed the lease.

Note. Therefore, if the lessee starts to pay rent as lessee or enters into possession as lessee, the lease is considered to have been entered into even if neither party has executed the lease at that time. Money paid in advance (purportedly as rent) as a deposit to secure premises for a proposed lease does not constitute rent paid as lessee under the lease.

PART 2—BEFORE THE LEASE IS ENTERED INTO**Copy of lease to be provided at negotiation stage**

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

- (a) the person has in his or her possession a copy of the proposed retail shop lease (in written form, but not necessarily including particulars of the lessee, the rent or the term of the lease) for the purpose of making the lease available for inspection by a prospective lessee; and

- (b) the person makes a copy of the proposed lease available to any prospective lessee as soon as the person enters into negotiations with the prospective lessee concerning the lease.

Maximum penalty: 50 penalty units.

Right to compensation for pre-lease misrepresentations

10. (1) A party to a retail shop lease is liable to pay another party to the lease (“the injured party”) reasonable compensation for damage suffered by the injured party that is attributable to the injured party’s entering into the lease as a result of a false or misleading statement or representation made by the party, or any person acting under the party’s authority, with knowledge that it was false or misleading.

(2) The giving of a disclosure statement to a prospective lessee under a retail shop lease is considered to be the making of a representation by the lessor to the lessee as to the information in the disclosure statement.

(3) This section extends to apply to a statement or representation made before the commencement of this section.

Lessee to be given disclosure statement

11. (1) At least 7 days before a retail shop lease is entered into, the lessee must be given a disclosure statement for the lease. A disclosure statement is a statement in writing that contains the information, and is accompanied by the material, that is contained in or required to complete or accompany the form of disclosure statement set out in Schedule 2 (but only to the extent that is relevant to the lease concerned). The layout of the disclosure statement need not comply with that of the form set out in Schedule 2.

Note. Because the disclosure statement need only include information relevant to the lease, if the retail shop is not in a retail shopping centre the disclosure statement need not include information that is relevant only to shops in retail shopping centres.

(2) If a lessee was not given a disclosure statement as required by subsection (1) or if the disclosure statement that was given to the lessee was incomplete or contained information that at the time it was given was materially false or misleading, the lessee may terminate the lease by notice in writing to the lessor at any time within 3 months after the lease was entered into, unless subsection (3) prevents termination.

(3) The lessee cannot terminate the lease under this section on the ground that the disclosure statement is incomplete or contains information that is materially false or misleading if:

- (a) the lessor has acted honestly and reasonably and ought reasonably to be excused for the failure concerned; and
- (b) the lessee is in substantially as good a position as the lessee would have been if the failure had not occurred.

(4) If a lease is entered into by way of the renewal of a lease, a written statement (a “disclosure update”) that updates the provisions of an earlier disclosure statement given to the lessee is, in conjunction with that earlier disclosure statement, considered to be a disclosure statement given for the purposes of this section at the time the disclosure update is given.

(5) The termination of a lease under this section does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the lease in respect of any period before its termination.

Lessee not required to pay undisclosed contributions

12. A provision of a retail shop lease that requires the lessee to pay or contribute towards the cost of any finishes, fixtures, fittings, equipment or services is void unless the liability to make the payment or contribution was disclosed in a disclosure statement given to the lessee in accordance with this Part.

Lease preparation costs

13. (1) If the lessee is liable to pay any amount to the lessor in respect of legal or other expenses incurred by the lessor in connection with the preparation of a retail shop lease, the lessor must provide the lessee with a copy of any account presented to the lessor in respect of those expenses and the lessee is not required to make any such payment until the lessor has complied with this requirement.

(2) Despite any provision of the lease or other agreement, the lessee is not liable to pay more than a reasonable sum in respect of any legal or other expenses incurred in connection with the preparation of the lease by the lessor.

(3) This section does not preclude any right the lessor may have to recover a reasonable sum in respect of any legal or other expenses incurred in connection with the preparation of a lease by the lessor from a person who enters into and then withdraws from negotiations with the lessor in respect of the lease.

Key-money prohibited

14. (1) A person must not, as lessor or on behalf of the lessor, seek or accept the payment of key-money in connection with the granting of a retail shop lease and any provision of a retail shop lease is void to the

extent that it requires or has the effect of requiring the payment of key-money in connection with the granting of the lease.

- (2) If a person contravenes this section:
 - (a) the person is guilty of an offence and liable to a penalty not exceeding 100 penalty units; and
 - (b) (whether or not the person is convicted of an offence under paragraph (a)) the lessee is entitled to recover from the lessor as a debt any payment made or the value of any benefit conferred by the lessee and accepted by or on behalf of the lessor in contravention of this section.
- (3) This section does not prevent a lessor:
 - (a) from requiring payment by the lessee of a reasonable sum in respect of any legal or other expenses incurred in connection with the preparation and entering into of the lease; or
 - (b) from receiving payment of rent in advance; or
 - (c) from securing performance of the lessee's obligations under the lease by requiring the provision of a bond or security deposit or a guarantee from the lessee or any other person (such as a requirement that the directors of a company that is the lessee guarantee performance of the company's obligations under the lease); or
 - (d) from seeking and accepting payment for goodwill of a business from a purchaser of the business, but only to the extent that the goodwill is attributable to the conduct of the business by the lessor; or
 - (e) from seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the lessor to the lessee in connection with the granting of the lease; or
 - (f) from seeking and accepting payment for the grant of a franchise in connection with the granting of the lease.

Lease documentation

15. (1) A retail shop lease is taken to include provision to the following effect:

- (a) If the lease is not to be registered, the lessor must provide the lessee with an executed copy of the stamped lease within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following payment of stamp duty on the lease.

- (b) If the lease is to be registered, the lessor must lodge the lease for registration within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following payment of stamp duty on the lease and the lessor must provide the lessee with an executed copy of the stamped and registered lease within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following registration of the lease.
 - (c) The periods specified in paragraphs (a) and (b) are to be extended for delays attributable to the need to obtain any consent from a head lessor or mortgagee.
 - (d) In paragraphs (a) and (b), "**registered**" means registered under the Real Property Act 1900.
- (2) This section does not affect the operation of the Stamp Duties Act 1920 or the Real Property Act 1900.

Minimum 5 year term

16. (1) The term for which a retail shop lease is entered into, together with any further term or terms provided for by any agreement or option for the acquisition by the lessee of a further term as an extension or renewal of the lease, must not be less than 5 years. An agreement or option is not taken into account if it was entered into or conferred after the lease was entered into.

(2) If a lease is entered into in contravention of this section, the validity of the lease is not thereby affected but the term of the lease is extended by such period as may be necessary to prevent the lease contravening this section.

Note. For example, if a lease is entered into for a term of 3 years, its term is extended by 2 years to 5 years. If a lease is entered into for a term of 2 years with an option for a further 1 year after that initial 2 years, the term of the lease is extended to 4 years (with the option for a further 1 year after that initial 4 years).

(3) This section does not apply to a lease if a lawyer not acting for the lessor certifies in writing that he or she has, at the request of the prospective lessee, explained the effect of subsections (1) and (2) to the prospective lessee and that the giving of the certificate will result in this section not applying to the lease.

(4) This section does not apply to a lease that results from the renewal of an earlier lease pursuant to an option conferred on the lessee, so long as there was no break in the entitlement of the lessee to possession of the retail shop and the option was granted by that earlier lease or by an agreement entered into before or at the same time as that earlier lease was entered into.

Note. Because of subsection (4), a lease will not be required to be for 5 years if it is a renewal of an earlier lease (because the minimum 5 year term requirement applied to the earlier lease and the availability of the renewal will have been taken into account in determining the term of that earlier lease).

(5) This section does not apply to a lease to the extent that its application would be inconsistent with the terms of any head lease under which the lessor holds the retail shop.

PART 3—RENT AND OUTGOINGS

Payment of rent when lessor's fitout not completed

17. (1) This section applies to a retail shop lease if:
- (a) the liability of the lessee to pay rent under the lease commences on the lessee entering into possession of the retail shop (whether or not the lessee is required to enter into possession by a specified date); and
 - (b) the lessor has fitout obligations under the lease (that is, the lessor is required to provide any finishes, fixtures, fittings, equipment or services before the lessee enters into possession of the shop).
- (2) A retail shop lease to which this section applies is taken to provide that:
- (a) the lessee is not liable to pay rent, or any other amount payable under the lease by the lessee (such as an amount payable in respect of outgoings), in respect of any period before the lessor has substantially complied with the lessor's fitout obligations; and
 - (b) the lessor is not entitled to deny the lessee possession of the retail shop merely because the lessor has not complied with the lessor's fitout obligations under the lease.

Restrictions on adjustment of base rent

18. (1) In this section:

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

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

- (2) A retail shop lease must not provide for a change to base rent less than 12 months after the lease is entered into and must not provide for a

change to that rent less than 12 months after any previous change to that rent. This subsection does not apply to a change to base rent by a specified amount or specified percentage.

Note. For example, subsection (2) prevents a lease providing for an increase to current market rent more than once in 12 months. It does not prevent a lease providing for the rent to increase by \$100 every 6 months. Nor does it prevent a lease providing for the rent to be increased to current market rent after 12 months and then to be increased by 2% every 6 months after that.

- (3) A provision of a retail shop lease is void to the extent that it:
 - (a) reserves or has the effect of reserving to one party a discretion as to which of 2 or more methods of calculating a change to base rent is to apply on a particular occasion of a change to that rent; or
 - (b) provides for a method of calculating a change to the base rent but reserves or has the effect of reserving to one party a discretion as to whether or not the base rent is to be changed in accordance with that method on a particular occasion; or
 - (c) provides for base rent to change on a particular occasion in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent.

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

Reviews to current market rent

19. A retail shop lease that provides for rent to be changed to current market rent is taken to include provision to the following effect:

- (a) The current market rent of the retail shop is the rent that, having regard to the terms and conditions of the lease and such other matters as are relevant to the assessment of current market rent, would be reasonably expected to be paid for the shop if it were unoccupied and offered for renting for the use to which the shop may be put in accordance with the lease.
- (b) Rent concessions and other benefits that are frequently or generally offered to prospective lessees of unoccupied retail shops are declared to be relevant matters to be taken into account in the assessment of current market rent.
- (c) The value of goodwill created by the lessee's occupation and the value of the lessee's fixtures and fittings on the retail shop premises are to be ignored for the purposes of the assessment of current market rent.

- (d) If the lessor and the lessee do not agree as to what the actual amount of that rent is to be, the amount of the rent is to be determined by valuation carried out by a person appointed by agreement between the parties to the lease or, failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Valuers and Land Economists (NSW Division) Inc.

Note. The parties may agree to appoint a person nominated by the President of the Real Estate Institute of New South Wales, or nominated by some other person of the parties' choice.

- (e) A valuation for the purposes of paragraph (d) is to be a "speaking valuation" (that is, the valuer must give detailed reasons for his or her determination and must specify the matters to which he or she had regard for the purposes of making his or her determination).
- (f) The parties to the lease are to pay the costs of a valuation pursuant to the procedure set out in paragraph (d) 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.

Turnover rent

20. (1) For the purposes of any provision of a retail shop lease that relates to the determination of rent or a component of rent by reference to turnover, "**turnover**" does not include any of the following:

- (a) the amount of losses incurred in the resale or disposal of merchandise reasonably and properly purchased from customers as trade-ins in the usual course of business;
- (b) the amount of deposits and instalments received on account of lay-bys, hire purchase or credit sales, and which are refunded to customers;
- (c) the amount of a refund on a transaction when the proceeds of the transaction have been included as part of turnover,
- (d) the amount of any service, finance or interest charges payable to any financier in connection with provision of credit to customers (other than commissions on credit or store cards);
- (e) the price of merchandise exchanged between shops of the lessee if the exchange is made solely for the convenient operation of the business of the lessee and not for the purpose of concluding a sale made at or from the shop to which the lease relates;

- (f) the price of merchandise returns to shippers, wholesalers or manufacturers;
- (g) the proceeds of sale of the lessee's fixtures and fittings after their use in the conduct of business at or from the retail shop to which the lease relates;
- (h) the amount of discounts allowed to customers in the normal course of business;
- (i) the amount of uncollected credit accounts that are written off;
- (j) the net amount paid or payable by the lessee on account of any purchase tax, receipt tax, or other similar tax imposed at the point of retail sale or hire of goods or services;
- (k) the amount of delivery charges;
- (1) the amount received from the sale of lottery tickets and similar tickets (other than commission on those sales).

(2) The lease is taken to provide for any underpayment or overpayment of rent (resulting from actual turnover differing from projected or presumed turnover) to be adjusted within 1 month after the lessee requests the lessor in writing for such an adjustment and provides the lessor with such information as the lessor may reasonably require to make the adjustment.

(3) The lessee may make a request for such an adjustment only once in the first 12 months of the lease term and thereafter only at intervals of not less than 12 months following the first request for an adjustment under the lease. This subsection does not prevent the lease providing for, or the parties otherwise agreeing to, more frequent adjustments than are provided for by this section.

(4) For the purposes of this section, the concept of "turnover" includes gross takings, gross receipts, gross income and similar concepts.

Special rent—cost of fitout

21. Nothing in this Act prevents a retail shop lease from providing for the payment of a special rent (in addition to any other rent) to cover the cost of fitout, fixtures, fittings and equipment installed or provided by the lessor at the lessor's expense.

Recovery of outgoings from lessee

22. (1) The lessee under a retail shop lease is not liable to pay any amount to the lessor in respect of any outgoings except in accordance with provisions of the lease that specify:

- (a) the outgoings that are to be regarded as recoverable; and
- (b) how the amount of those outgoings will be determined and how they will be apportioned to the lessee; and
- (c) how those outgoings or any part of them may be recovered by the lessor from the lessee.

(2) In this Part, the expression “**outgoings to which the lessee contributes**” refers to any outgoings in respect of which the lessee is liable under the lease to make any payment to the lessor.

(3) Costs associated with the advertising or promotion of a retail shop or retail shopping centre, or of any business carried on there, are not outgoings for the purposes of this section.

Capital costs not recoverable from lessee

23. A provision in a retail shop lease is void to the extent that it requires the lessee to pay any amount in respect of the capital costs of the building in which the retail shop is located or (in the case of a retail shop in a retail shopping centre) of any building in the retail shopping centre or any areas used in association with any such building.

Depreciation not recoverable from lessee

24. A provision in a retail shop lease is void to the extent that it requires the lessee to pay any amount in respect of depreciation.

Sinking fund for major repairs and maintenance

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

- (a) Any amount paid by the lessee in respect of the lessor’s outgoings on account of those major items of repair or maintenance is to be paid into the sinking fund.
- (b) So much of the balance standing to the credit of the sinking fund as remains unexpended from time to time for any purpose for which the sinking fund was established is to be held by the lessor in an account bearing interest.
- (c) Amounts paid by the lessee for credit of the sinking fund, and the net interest earned by the lessor on the sinking fund, must not be applied by the lessor for any purpose other than payment of any outgoings for which the sinking fund was established.

- (d) The lessor is liable to contribute to the sinking fund any deficiency attributable to a failure by the lessor or any predecessor in title of the lessor to comply with paragraph (c).

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

Limit on recovery of land tax

26. (1) A provision of a retail shop lease which requires the lessee to pay money to the lessor in respect of outgoings attributable to land tax payable by the lessor is taken to include provision that the liability of the lessee is not to exceed the amount of that liability had the amount of land tax payable by the lessor been assessed on the basis that:

- (a) the land concerned was the only land owned by the lessor; and
- (b) the land concerned was not subject to a special trust (within the meaning of the Land Tax Management Act 1956); and
- (c) the lessor was not a company classified under section 29 of that Act as a non-concessional company.

(2) The “**land concerned**” is the land on which the building or retail shopping centre of which the retail shop forms part is situated, together with all the other land of the lessor used or available for use 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. In the case of a shop comprising a strata lot under the Strata Titles Act 1973, the “**land concerned**” is the strata lot.

Estimates and expenditure statement of outgoings to be provided by lessor

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

- (a) The lessor must give the lessee a written estimate of the outgoings to which the lessee contributes under the lease, itemising those outgoings under the item descriptions used in the list of outgoings in the form of disclosure statement set out in Schedule 2.
- (b) The estimate of outgoings must be given to the lessee in respect of each accounting period of the lessor during the term of the lease and must be given before the lease is entered into and thereafter during the term of the lease at least 1 month before the commencement of the accounting period concerned.

- (c) The lessor must make a written expenditure statement available for examination by the lessee detailing all expenditure by the lessor on account of outgoings to which the lessee contributes, itemising those outgoings under the item descriptions used in the list of outgoings in the form of disclosure statement set out in Schedule 2.
- (d) The expenditure statement must be made available at least twice in each of the lessor's accounting periods during the term of the lease (once in relation to expenditure during the first 6 months of each such accounting period and once in relation to expenditure during the second 6 months of each such accounting period), and in each case must be made available within 1 month after the end of the 6 month period to which it relates,

Lessor to provide auditor's report on outgoings

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

- (a) The lessor must give the lessee a written report that complies with this section and details all expenditure by the lessor in each accounting period of the lessor during the term of the lease on account of outgoings to which the lessee contributes.
- (b) Each report is to be given to the lessee within 3 months after the end of the accounting period to which it relates.
- (c) The report is to be prepared by a registered company auditor (within the meaning of the Corporations Law) and is to be prepared in accordance with accounting standards (within the meaning of the Corporations Law).
- (d) The report is to include a statement by the person who prepared the report as to whether or not the amounts paid by the lessee in respect of outgoings were properly payable by the lessee and as to whether or not the total amount of outgoings in respect of which the lessee contributed (that is, the estimated total expenditure by the lessor on outgoings) exceeded the total amount actually expended by the lessor in respect of those outgoings during the period concerned.
- (e) The report may be a composite report (that is, it may relate to more than one lessee) so long as each lessee to which it relates is able to determine from the report whether or not the amounts paid by the lessee in respect of outgoings were properly payable by the lessee.

- (f) The report need not comply with paragraphs (c) and (d) if the report does not relate to any outgoings other than land tax, water, sewerage and drainage rates and charges, local council rates and charges and insurance, so long as it is accompanied by copies of receipts in respect of all expenditure by the lessor as referred to in paragraph (a).

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

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

- (a) Within 1 month after the end of each period in respect of which the lessee contributes to outgoings under the lease, there is to be an adjustment between the lessor and the lessee to take account of any under-payment or over-payment by the lessee in respect of those outgoings.
- (b) The adjustment is to be calculated on the basis of the difference between the total amount of outgoings in respect of which the lessee contributed (that is, the estimated total expenditure by the lessor on outgoings during the period concerned) and the total amount actually expended by the lessor in respect of those outgoings during that period, but taking into account only expenditure properly and reasonably incurred by the lessor in payment of those outgoings.
- (c) Contribution by the lessee towards, and expenditure by the lessor in respect of, repairs and maintenance is not to be taken into account for the purposes of the adjustment to the extent that the contribution is, and the expenditure is in respect of, contributions required to be paid into a sinking fund as referred to in section 25.

Non-specific outgoings contribution limited by ratio of lettable area

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

(2) An outgoing is “**referable**” to a retail shop if the shop is one of the shops that enjoys or shares the benefit resulting from the outgoing.

Note. This section prevents a lessee being required to make up for any shortfall in outgoings recouped by the lessor that is attributable to vacant shops or concessions allowed to other lessees.

Determination of current market rent under options to renew

31. A retail shop lease which provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect:

- (a) The current market rent of the retail shop is the rent that, having regard to the terms and conditions of the lease and such other matters as are relevant to the assessment of current market rent, would be reasonably expected to be paid for the shop if it were unoccupied and offered for renting for the use to which the shop may be put in accordance with the lease.
- (b) Rent concessions and other benefits that are frequently or generally offered to prospective lessees of unoccupied retail shops are declared to be relevant matters to be taken into account in the assessment of current market rent.
- (c) The value of goodwill created by the lessee’s occupation and the value of the lessee’s fixtures and fittings on the retail shop premises are to be ignored for the purposes of the assessment of current market rent.
- (d) If the lessor and the lessee do not agree as to what the actual amount of that rent is to be, the amount of the rent is to be determined by valuation carried out by a person appointed by agreement between the parties to the lease or, failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Valuers and Land Economists (NSW Division) Inc.

Note. The parties may agree to appoint a person nominated by the President of the Real Estate Institute of New South Wales, or nominated by some other person of the parties’ choice.

- (e) A valuation for the purposes of paragraph (d) is to be a “speaking valuation” (that is, the valuer must give detailed reasons for his or her determination and must specify the matters to which he or she had regard for the purposes of making his or her determination).

- (f) The parties to the lease are to pay the costs of a valuation pursuant to the procedure set out in paragraph (d) 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.

Opportunity for lessee to have current market rent determined early

32. (1) A retail shop lease which provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect:

- (a) The lessee is entitled to request a determination of the current market rent at any time within the period that begins 6 months before and ends 3 months before the last day on which the option may be exercised under the lease, but may not make such a request if the lessor and the lessee have already agreed as to what the actual amount of that rent is to be.
 - (b) The lessee makes such a request by giving notice in writing of the request to the lessor.
 - (c) If the lessee makes such a request, the amount of the current market rent is to be determined (as at the time of the request) in accordance with the provisions of section 31, and the period within which the lessee must exercise the option is varied so that the last day on which the option may be exercised is 21 days after the determination of rent is made and notified to the lessee in writing or the last day of the term of the lease, whichever is the earlier.
 - (d) The parties agree that the amount of rent determined under paragraph (c) is the current market rent for the purposes of the exercise of the option (even though it may be a determination of the current market rent as at some earlier time).
 - (e) The parties to the lease are to pay the costs of the determination of current market rent in equal shares.
- (2) If the term of the lease is 12 months or less, the periods of 6 months and 3 months in this section are shortened to 3 months and 30 days respectively.

PART 4—ALTERATIONS AND OTHER INTERFERENCE WITH THE SHOP

Lessee to be given notice of alterations and refurbishment

33. A retail shop lease is taken to provide that the lessor must not commence to carry out any alteration or refurbishment of the building or retail shopping centre of which the retail shop forms part which is likely to adversely affect the business of the lessee unless:

- (a) the lessor has notified the lessee in writing of the proposed alteration or refurbishment at least 2 months before it is commenced; or
- (b) the alteration or refurbishment is necessitated by an emergency and the lessor has given the lessee the maximum period of notice that is reasonably practicable in the circumstances.

Lessee to be compensated for disturbance

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

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

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

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

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

(4) The provisions implied by this section do not apply to any action taken by the lessor:

- (a) as a reasonable response to an emergency situation; or
- (b) in compliance with any duty imposed by or under an Act or resulting from a requirement imposed by a public or local authority acting under the authority of an Act.

Demolition

35. (1) If a retail shop lease provides for termination of the lease on the grounds of proposed demolition of the building of which the retail shop forms part, the lease is taken to include provision to the following effect:

- (a) The lease cannot be terminated on that ground unless and until the lessor has provided the lessee with details of the proposed demolition sufficient to indicate a genuine proposal to demolish that building within a reasonably practicable time after the lease is to be terminated.
 - (b) The lease cannot be terminated by the lessor on that ground without at least 6 months written notice of termination.
 - (c) If notice of termination on that ground is given to the lessee, the lessee may terminate the lease by giving the lessor not less than 7 days written notice of termination at any time within 6 months before the termination date notified by the lessor.
- (2) If the lease is for a term of 12 months or less, the period of 6 months in subsection (1) (b) and (c) is shortened in each case to 3 months.
- (3) If a retail shop lease is terminated on such a ground and demolition of the building is not carried out within a reasonably practicable time after the termination date notified by the lessor, the lessor is liable to pay the lessee reasonable compensation for damage suffered by the lessee as a consequence of the early termination of the lease, unless the lessor establishes that at the time notice of termination was given by the lessor there was a genuine proposal to demolish the premises within that time.
- (4) For the purposes of this section, “demolition” of the building of which a retail shop forms part includes any substantial repair, renovation or reconstruction of the building that cannot be carried out practicably without vacant possession of the shop.

Damaged premises

36. (1) A retail shop lease is taken to provide for the following if the shop or the building of which the shop forms part is damaged:

- (a) The lessee is not liable to pay rent, or any amount payable to the lessor in respect of outgoings or other charges, that is attributable to any period during which the shop cannot be used under the lease or is inaccessible due to that damage.
- (b) If the shop is still useable under the lease but its useability is diminished due to the damage, the lessee's liability for rent and any amount in respect of outgoings attributable to any period during which useability is diminished is reduced in proportion to the reduction in useability caused by the damage.
- (c) If the lessor notifies the lessee in writing that the lessor considers that the damage is such as to make its repair impracticable or undesirable, the lessor or the lessee may terminate the lease by giving not less than 7 days notice in writing to the other and no compensation is payable in respect of that termination.
- (d) If the lessor fails to repair the damage within a reasonable time after the lessee requests the lessor in writing to do so, the lessee may terminate the lease by giving not less than 7 days notice in writing of termination to the lessor.
- (e) Paragraphs (a)–(d) do not affect any right of the lessor to recover damages from the lessee in respect of any damage or destruction to which those paragraphs apply.

A retail shop lease must not contain any provision the effect of which is to limit any liability of a party to the lease to pay compensation to another party to the lease in respect of damage to the shop or the building of which the shop forms part.

(3) Nothing in this section prevents the parties to a lease from terminating the lease by agreement if the shop or the building of which it forms part is damaged or destroyed.

Employment restriction

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

- (a) a provision specifying minimum standards of competence and behaviour for persons employed in the shop or other persons (such as contractors) doing work in the shop;

- (b) a provision prohibiting work from being carried out on specified items of the lessor's property;
- (c) a provision requiring the lessee to comply with the requirements of any industrial award, industrial agreement or enterprise agreement (such as a construction site agreement) affecting any retail shopping centre in which the shop is situated.

Refurbishment and refitting

38. Provision in a retail shop lease requiring the lessee to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting.

PART 5—ASSIGNMENT AND TERMINATION**Grounds on which consent to assignment can be withheld**

39. (1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):

- (a) if the proposed assignee proposes to change the use to which the shop is put.;
- (b) if the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor;
- (c) if the lessee has not complied with section 41 (Procedure for obtaining consent to assignment).

(2) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the consent, so long as the lessor has substantiated those expenses to the lessee at the request of the lessee.

Key-money on assignment prohibited

40. (1) A person must not, as lessor or on behalf of the lessor, seek or accept the payment of key-money in connection with the granting of consent to the assignment of a retail shop lease and any provision of a retail shop lease is void to the extent that it requires or has the effect of requiring the payment of key-money in connection with the granting of consent to the assignment of the lease.

- (2) If a person contravenes this section:
- (a) the person is guilty of an offence and liable to a penalty not exceeding 100 penalty units; and
 - (b) (whether or not the person is convicted of an offence under paragraph (a)) the lessee is entitled to recover from the lessor as a debt any payment made or the value of any benefit conferred by the lessee and accepted by or on behalf of the lessor in contravention of this section.

(3) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such a consent. The lessee is entitled to have those expenses substantiated by the lessor before making such a payment.

Note. This section and section 39 do not prevent the lessor and a proposed assignee entering into a new lease of the retail shop as an alternative to an assignment of the existing lease.

Procedure for obtaining consent to assignment

- 41.** A retail shop lease is taken to include the following provisions:
- (a) A request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with such information as the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee.
 - (b) Before requesting the consent of the lessor to a proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee is aware or could reasonably be expected to be aware).
 - (c) For the purpose of enabling the lessee to comply with paragraph (b), the lessee is entitled to request the lessor to provide the lessee with a copy of the disclosure statement concerned and, if the lessor is unable or unwilling to comply with such a request within 14 days after it is made, paragraph (b) does not apply to the lessee.
 - (d) The lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if the lessee has complied with paragraphs (a) and (b) and the lessor has not within 42 days after the request was made given notice in writing to the lessee either consenting or withholding consent.

Lessor may reserve right to refuse sublease, mortgage

42. A retail shop lease may contain a provision which allows the lessor to refuse in the lessor's absolute discretion:

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

Application of Conveyancing Act 1919

43. Section 133B (Covenants against assigning) of the Conveyancing Act 1919 does not apply to a retail shop lease to the extent that the section is inconsistent with this Act (or any conditions implied in a lease by this Act).

Notice to lessee of lessor's intentions at end of lease

44. (1) Not less than 6 months and not more than 12 months before the expiry of a lease, the lessor must by written notification to the lessee either:

- (a) offer the lessee a renewal or extension of the lease on terms specified in the notification (including terms as to rent); or
- (b) inform the lessee that the lessor does not propose to offer the lessee a renewal or extension of the lease.

Note. A notice under paragraph (b) may include other information as to the lessor's intentions (for example, that the lessor intends to allow the lessee to remain in possession of the shop as a periodic tenant under any provisions of the lease as to holding over, or as a tenant at will). Because such a statement is only a statement of intention, a lessee should be aware that it may not of itself bind the lessor.

(2) An offer made for the purposes of subsection (1) (a) is not capable of revocation for 1 month after it is made.

Note. This allows the lessee 1 month to decide whether to accept the offer. The lessor may agree to hold the offer open for longer than 1 month. The parties may also negotiate a new lease.

(3) If the lessor fails to give a notification to the lessee as required by this section, the term of the lease is extended until the end of 6 months after the lessor gives the notification required by this section, but only if the lessee requests that extension by notice in writing to the lessor given before the lease would otherwise have expired.

(4) During any extension of the lease under subsection (3), the lessee may terminate the lease by giving not less than 1 month's notice of termination in writing to the lessor.

(5) This section does not apply to a lease containing an option to renew or extend the lease or that is the subject of an agreement for the renewal or extension of the lease.

(6) If a retail shop lease is for a term of 12 months or less, the periods of 12 months and 6 months in this section are shortened to 6 months and 3 months respectively.

Key-money for renewal or extension prohibited

45. (1) A person must not, as lessor or on behalf of the lessor, seek or accept the payment of key-money in connection with the renewal or extension of a retail shop lease and any provision of a retail shop lease is void to the extent that it requires or has the effect of requiring the payment of key-money in connection with the renewal or extension of the lease.

(2) If a person contravenes this section:

- (a) the person is guilty of an offence and liable to a penalty not exceeding 100 penalty units; and
- (b) (whether or not the person is convicted of an offence under paragraph (a)) the lessee is entitled to recover from the lessor as a debt any payment made or the value of any benefit conferred by the lessee and accepted by or on behalf of the lessor in contravention of this section.

(3) This section does not prevent a lessor:

- (a) from requiring payment by the lessee of a reasonable sum in respect of any legal or other expenses incurred in connection with the renewal or extension of the lease; or
- (b) from receiving payment of rent in advance; or
- (c) from securing performance of the lessee's obligations under the renewed or extended lease by requiring the provision of a bond or security deposit or a guarantee from the lessee or any other person; or
- (d) from seeking and accepting payment for the grant of a franchise in connection with the renewal or extension of the lease.

PART 6—MISCELLANEOUS**Trading hours**

46. A provision in a retail shop lease is void to the extent that it would operate to require the lessee to trade at a time when trading would be unlawful.

Security deposits

47. (1) A retail shop lease is taken to include provision to the following effect:

- (a) Money paid by the lessee to the lessor as security for the performance of the lessee's obligations under the lease must be held by the lessor on behalf of the lessee in an account bearing interest.
- (b) The lessor must account to the lessee for interest earned on such a deposit but the lessor is entitled to retain any such interest and deal with it as money paid by the lessee to the lessor to form part of the security deposit concerned.
- (c) The lessor is not entitled to unreasonably refuse to accept a bank guarantee in satisfaction of any requirement to provide security in the form of a deposit, bond or third party guarantee for the performance of the lessee's obligations under the lease.

(2) This section does not prevent the lessor appropriating security moneys in accordance with any lawful entitlement to do so.

Independent legal advice

48. (1) The lessee or a prospective lessee under a retail shop lease must not be compelled to use the services of a lawyer nominated by the lessor.

(2) If the lessee or a prospective lessee is compelled to use the services of a lawyer in contravention of this section, the lessor is liable to pay to the lessee the amount of any fees paid by the lessee to that lawyer for those services.

(3) If a prospective lessee is compelled to use the services of a lawyer in contravention of this section for the purpose of the provision of a certificate referred to in section 16 (Minimum 5 year term), any certificate so provided is invalid for the purposes of section 16 if the lessee establishes that even though the certificate was given he or she did not understand the effect of section 16 (1) and (2) or did not understand that the giving of the certificate would result in section 16 not applying.

PART 7—ADDITIONAL REQUIREMENTS FOR RETAIL SHOPPING CENTRES**Part applies only to retail shopping centres**

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

Confidentiality of turnover information

50. If a retail shop lease requires the lessee to provide information to the lessor concerning the turnover of the business of the lessee, the lessor must not divulge or communicate to any person any information so provided by the lessee, but this does not prevent the lessor communicating or divulging any such information:

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

Maximum penalty: 20 penalty units.

Statistical information to be made available to lessee

51. If a retail shop lease requires the lessee to pay any amount in respect of outgoings on account of expenditure incurred in obtaining statistical information (such as "traffic counts"), the lease is taken to include provision that the lessor must make any information so obtained by the lessor available to the lessee.

Advertising and promotion requirements

52. A provision in a retail shop lease is void to the extent that it requires the lessee to undertake any advertising or promotion of the

lessee's business. This section does not apply to a provision in a lease that requires any payment to the lessor or advertising and promotion costs incurred or to be incurred by the lessor.

Note. This does not prevent a lessee deciding to make an additional contribution towards advertising and promotion. It is good leasing practice for a lessor to require all lessees in the shopping centre to contribute towards advertising and promotion costs for the centre.

Marketing plan for advertising and promotion

53. If a retail shop lease requires the lessee to pay any amount to the lessor in respect of advertising and promotion costs, the lease is taken to include provision to the following effect:

- (a) The lessor must, at least 1 month before the start of each accounting period of the lessor, make available to the lessee a marketing plan that gives details of the lessor's proposed expenditure on advertising and promotion during that accounting period.
- (b) If such a payment relates to an opening promotion, the lessor must, at least 1 month before that opening promotion, make available to the lessee details of the proposed expenditure on that promotion.

6-monthly advertising and promotion expenditure statement to be made available to lessees

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

- (a) The lessor must make a written statement available for examination by a lessee detailing all expenditure by the lessor on account of advertising and promotion costs to which the lessee is required to contribute under the lease.
- (b) The lessor must make the statement available at least twice in each of the lessor's accounting periods during the term of the lease (once in relation to expenditure during the first 6 months of each such accounting period and once in relation to expenditure during the second 6 months of each such accounting period).
- (c) The statement must be made available within 1 month after the end of the 6 month period to which it relates.

Lessor to provide auditor's report on advertising and promotion expenditure

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

- (a) The lessor must give the lessee a written report that complies with this section and details all expenditure by the lessor in each accounting period of the lessor during the term of a retail shop lease on account of advertising or promotion costs to which the lessee is required to contribute under the lease.
- (b) Each report is to be given to the lessee within 3 months after the end of the accounting period to which it relates.
- (c) The report is to be prepared by a registered company auditor (within the meaning of the Corporations Law) and is to be prepared in accordance with accounting standards (within the meaning of the Corporations Law).

Unexpended advertising and promotion contributions to be carried forward

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

Relocation

57. If a retail shop lease contains provision that enables the business of the lessee to be relocated within the retail shopping centre, 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 (including as to rent) as the existing lease except that the term of the new lease is to be for the remainder of the term of the existing lease.

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 legal costs.

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

Termination for inadequate sales prohibited

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

Geographical restrictions

59. (1) A lease must not contain a provision which has the effect of preventing or restricting the lessee from carrying on business outside the retail shopping centre, either during the term of or after the expiry of the lease.

(2) This section does not operate to prevent a lease or other agreement from containing a provision that prevents the use of the name of the retail shopping centre in connection with a business carried on outside the shopping centre.

Tenants association

60. A lease must not contain a provision which has the effect of preventing or restricting the lessee from joining, forming or taking part in any activities of any tenants association or other similar body.

Note. This section does not prevent a lessor from encouraging lessees to become involved in marketing advisory panels.

Trading hours

61. (1) A lease of a retail shop is taken to include provision to the effect that a lessor is not entitled to change the core trading hours of the retail shopping centre of which the shop forms part except with the approval in writing of the lessees of a majority of the retail shops in the shopping centre (whether or not those retail shops are retail shops to which this Act applies). The initial fixing of trading hours in a new shopping centre is not a change to core trading hours and is not affected by this subsection.

(2) Subsection (1) does not operate to permit a lessor to ignore the requirements of any other agreement, arrangement or understanding that prevents or restricts a change to core trading hours by the lessor in a retail shopping centre.

Note. An example of how subsection (2) operates is where another agreement requires a 75% majority of lessees to be in favour of a change to core trading hours before the lessor can make the change. Subsection (2) requires that the other agreement be complied with also, so that a 75% majority must be obtained and not merely the 50% majority required by subsection (1).

(3) This section does not prevent a lease providing for the action that may be taken by a lessor in the event of a lessee not trading in accordance with core trading hours, including provisions:

- (a) enabling the lessor, as a condition of granting consent to a lessee trading outside core trading hours, to require the lessee to pay, or pay a contribution towards, the costs of opening the retail shopping centre during those extended trading hours; or
- (b) requiring a lessee who trades outside core trading hours to make specified payments or additional payments in respect of advertising and promotional costs for the shopping centre.

(4) The “**core trading hours**” of a retail shopping centre are the times when retail shops in the shopping centre are required to be open for business, whether the requirement is imposed by or under a lease or by or under some other agreement, arrangement or understanding between lessors and the lessees.

Special provision for strata shopping centres

62. If a retail shop lease applies in respect of a shop that comprises the whole or part of a strata lot under the Strata Titles Act 1973, sections 50–56 and 61 apply in respect of the lease as if:

- (a) references in those sections to a retail shop lease (or a provision of the lease) included a reference to the by-laws (or a provision of the by-laws) for the strata scheme concerned; and
- (b) references in those sections to the lessor included reference to the body corporate under the strata scheme concerned and any centre manager appointed, employed or engaged by the body corporate to have management functions in respect of the centre.

Note. Considering section 54 as an example of the operation of section 62:

The provisions of section 54 are taken to form part of the by-laws for the retail shopping centre. The section will then operate to impose requirements on the lessor, the body corporate and the centre manager. If advertising and promotion costs are charged to a lessee under the by-laws and not the lease, the lessor will have no obligations under section 54 because those amounts are not charged under the lease. The Body corporate and the centre manager on the other hand will have the obligations that the lessor would otherwise have had.

PART 8—DISPUTE RESOLUTION**Division 1—Preliminary****Interpretation**

63. (1) In this Part:

“**court**” means a court, tribunal or other body or person authorised by law, or by consent or agreement of parties, to decide or resolve any issue that is in dispute between parties, and includes an arbitrator;

“**retail tenancy dispute**” means any dispute concerning the liabilities or obligations (including any obligation to pay money) of a party or former party to a retail shop lease, being liabilities or obligations which arose under the lease or which arose in connection with the use or occupation of the retail shop to which the lease relates;

“**Tribunal**” means the Commercial Tribunal under the Commercial Tribunal Act 1984.

(2) This Part extends to apply to:

- (a) 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; and

- (b) a dispute that arose before the commencement of section 6 or which concerns a liability or obligation that arose before the commencement of section 6.

Division 2—Mediation

The Registrar

64. (1) The Minister is to appoint the holder of a statutory office or a public servant as the Registrar of Retail Tenancy Disputes for the purposes of this Act.

(2) The Registrar may, for the purposes of this Act and with the approval of the Minister, arrange for the use of the services of any staff or facilities of a government department, administrative office or a public or local authority.

(3) The Registrar may delegate to any public servant the exercise of any function of the Registrar under this Act, except this power of delegation.

Functions of the Registrar

65. (1) The Registrar has the following functions:

- (a) to make arrangements to facilitate the resolution by mediation of retail tenancy disputes (whether or not a dispute has been formally referred to the Registrar under this Act);
- (b) to report to the Minister on the operation of this Act;
- (c) such other functions as may be conferred or imposed on the Registrar by or under this or any other Act.

(2) The Registrar may, at any stage of proceedings brought before a court concerning a retail tenancy dispute intervene in the proceedings. If the Registrar intervenes in proceedings, the Registrar becomes a party to the proceedings and has all the rights (including rights of appeal) of a party to the proceedings.

(3) In making arrangements for the resolution by mediation of retail tenancy disputes, the Registrar is to have regard to the need for mediation of those disputes to be conducted by persons who are experienced in the field of retail shop leases.

(4) In the exercise of his or her functions under this Act, the Registrar is not subject to the control or direction of the Minister.

Mediation of disputes

66. (1) Either or both of the parties or former parties to a retail shop lease may refer a retail tenancy dispute to the Registrar for mediation of the dispute. The Registrar is entitled to charge an application fee (not exceeding any maximum fee prescribed by the regulations) for the referral of a retail tenancy dispute to the Registrar.

Note. Before applying for formal mediation of a dispute parties are encouraged to approach the Registrar for preliminary assistance of the kind referred to in section 67. There is no charge for this.

(2) The costs of and associated with formal mediation before a mediator of a retail tenancy dispute under arrangements made by the Registrar are to be paid by the person or persons applying to the Registrar for mediation of the dispute in such proportions as they may agree among themselves or, failing agreement, in equal shares.

The nature of mediation

67. Mediation is not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.

Note. The first step in any dispute is to ensure that the parties have read their lease and have spoken to one another about their concerns in an effort to resolve the dispute.

Retail tenancy disputes must be submitted to mediation before proceedings can be taken

68. (1) A retail tenancy dispute may not be the subject of proceedings before any court unless and until the Registrar has certified in writing that mediation under this Part has failed to resolve the dispute or the court is otherwise satisfied that mediation under this Part is unlikely to resolve the dispute.

(2) The Registrar must certify that mediation under this Part has failed to resolve a retail tenancy dispute if the Registrar is satisfied that any one or more of the parties to the dispute has refused to take part in or has withdrawn from mediation of the dispute.

(3) This section does not apply to proceedings before a court for an order in the nature of an injunction.

(4) This section does not operate to affect the validity of any decision made by a court.

Statements made during mediation not admissible

69. Any statement or admission made in the course of the mediation of a retail tenancy dispute pursuant to arrangements made by the Registrar under this Part is not admissible at a hearing of a claim under Division 3 or in any other legal proceeding.

Division 3—Determination of retail tenancy claims by Commercial Tribunal**Meaning of “retail tenancy claim”**

70. In this Division:

“**retail tenancy claim**” means any of the following claims in connection with a liability or obligation with which a retail tenancy dispute is concerned:

- (a) a claim for the payment of a specified sum of money;
- (b) a claim for relief from payment of a specified sum of money;
- (c) a claim for the doing of specified work or the provision of specified services.

Lodging of claim with Commercial Tribunal

71. A party or former party to a retail shop lease may lodge a retail tenancy claim in respect of the lease with the Tribunal. A claim may not be lodged more than 3 years after the liability or obligation that is the subject of the claim arose.

Jurisdiction and powers of Tribunal

72. (1) The Tribunal has jurisdiction to hear and determine a retail tenancy claim lodged with the Tribunal under this Part.

(2) In proceedings on such a claim, the Tribunal is empowered to make such one or more of the following orders as it considers appropriate:

- (a) an order that a party to the proceedings pay money to a person specified in the order;
- (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person;
- (c) an order that a party to the proceedings do any specified work or perform any specified service.

(3) 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.

(4) The Tribunal may impose such conditions as it considers appropriate when making an order under this section.

(5) 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.

Monetary limit on Tribunal's jurisdiction

73. The Tribunal has no jurisdiction to make an order or orders in respect of a particular retail tenancy claim if the total of:

- (a) the amount or amounts (if any) of money to be paid; and
- (b) the amount or amounts (if any) of money to be declared not to be due or owing; and
- (c) the value or values (if any) of the work to be done or the services to be performed,

under or by virtue of the order or orders would exceed \$250,000 or such other amount as may be prescribed by the regulations.

Tribunal must attempt to conciliate

74. (1) The Tribunal must not make an order in respect of a retail tenancy claim that is before it unless it has brought, or used its best endeavours to bring, the parties to the claim to a settlement acceptable to all of them.

(2) For that purpose, the Tribunal may adjourn the hearing of a claim to enable the dispute concerned to be referred to the Registrar under Division 2 for mediation of the dispute.

(3) If such a settlement is reached, the Tribunal must make an order under this Division that gives effect to the settlement to the extent permitted by this Division.

Removal of court proceedings to the Tribunal

75. (1) If civil proceedings pending in a court involve a retail tenancy dispute, the court must on the application of any party to the proceedings transfer the proceedings (or so much of the proceedings as involve such a dispute) to the Tribunal to be dealt with as a claim under this Division, but only if the court is satisfied that:

- (a) the dispute is such as may effectively be dealt with as a claim under this Division and that it is appropriate that the dispute be dealt with by the Tribunal; and
- (b) the interests of justice do not require that the matter be dealt with by the court.

(2) In determining whether or not it is appropriate that a matter be dealt with by the Tribunal, a court is to have regard to the general principle that retail tenancy disputes should be dealt with by the Tribunal rather than by a court.

(3) Proceedings are taken to involve a retail tenancy dispute if any issue in dispute in the proceedings involves a liability or obligation with which a retail tenancy dispute is concerned.

(4) This section does not prevent a court from granting urgent relief of an interlocutory nature where it is in the interests of justice to do so.

(5) This section does not apply to proceedings by way of an appeal.

(6) A court may make such ancillary orders as it considers necessary for the purpose of enabling an order under this section for the transfer of proceedings to the Tribunal to have full effect.

Jurisdictional overlap

76. (1) If a retail tenancy claim has been lodged with the Tribunal under this Part and at the time it was lodged no issue arising under the claim was the subject of a dispute in civil proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue in civil proceedings, unless:

- (a) the claim lodged with the Tribunal, or the part of that claim to which the issue relates, is withdrawn or is dismissed for want of jurisdiction; or
- (b) a court of record has, on a judicial review, quashed or declared invalid an order, determination or ruling of the Tribunal made in respect of the claim on the ground that the Tribunal had no jurisdiction to hear and determine the issue.

(2) If a retail tenancy claim has been lodged with the Tribunal under this Part and at the time it was lodged an issue arising under the claim was the subject of a dispute in civil proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue, unless:

- (a) those proceedings, or the part of the proceedings relating to the issue, are or is transferred to the Tribunal by the court concerned; or
- (b) those proceedings, or the part of the proceedings relating to the issue, are or is withdrawn or dismissed by the court, or by another court on appeal in those proceedings, for want of jurisdiction or without deciding the issue on its merits; or

(c) a court of record has, on a judicial review, quashed or declared invalid those proceedings or that part of those proceedings or any order, judgment or decision made in those proceedings in relation to the issue, on the ground that the first-mentioned court had no jurisdiction to hear and determine the issue.

(3) If a retail shop lease provides that a dispute be submitted to arbitration, it is competent for a retail tenancy claim involving that dispute to be lodged with the Tribunal under this Part unless all steps necessary to secure arbitration of the dispute have been taken.

(4) If a retail tenancy claim has been lodged with the Tribunal, my provision of a retail shop lease that provides for the submission of a dispute with which the claim is concerned to arbitration is of no effect in relation to the dispute.

Order of Tribunal to be final

77. (1) An order of the Tribunal is final and binding on all parties to a retail tenancy claim that is heard and determined by the Tribunal and no appeal lies in respect of an order of the Tribunal.

(2) The proceedings of the Tribunal and the finding or order of the Tribunal are not to be questioned in any proceedings except proceedings based solely on one or both of the following grounds:

- (a) that the Tribunal had or has no jurisdiction or has exceeded its jurisdiction in the proceedings in question or in making the finding or order in question; or
- (b) there has occurred a denial of natural justice in the course of the proceedings in question.

(3) This section does not limit or otherwise affect the operation of section 20 (Questions of procedure and law) of the Commercial Tribunal Act 1984.

PART 9—ANCILLARY INTERPRETATION PROVISIONS

Interpretation based on industry practice

78. In the interpretation of this Act, a court (as defined for the purposes of Part 8) is to have regard to accepted practices and interpretations within the industry concerning the leasing of retail shops.

Leases partly for retail shops and partly for other premises

79. If a retail shop lease applies to a retail shop as well as to other separate or adjoining premises that are not a retail shop, this Act applies to the lease only to the extent that the lease is a lease of a retail shop.

Meaning of “renewal” of lease

80. A reference in this Act to the renewal of a retail shop lease (“the current lease”) is a reference to the lessor and the lessee under the current lease entering into a new retail shop lease for the retail shop to which the current lease relates (whether or not on the same terms as the current lease).

PART 10—GENERAL**Extension of term—effect on Real Property Act 1900**

81. (1) The extension of the term of a retail shop lease by operation of a provision of this Act is of no effect for the purposes of the Real Property Act 1900 unless and until a lease is registered under that Act which gives effect to the extension of term, or the variation of a lease that is already registered under that Act is registered to give effect to the extension of term.

(2) The Registrar-General is not bound to inquire into or to recognise any increase or alleged increase in the term of a retail shop lease by operation of a provision of this Act.

(3) The lessor under a retail shop lease the term of which is extended by operation of a provision of this Act is bound, at the request of the lessee:

- (a) to execute a lease in the approved form for the purposes of the Real Property Act 1900 to enable registration of the lease under that Act (with its term so extended) if the lease is not already so registered; and
- (b) to enter into such variation of the lease as may be necessary to give effect to the extension of term if the lease is already registered under that Act, and to obtain all necessary consents, for the purposes of the registration under that Act of the variation of lease.

Exemptions from Act

82. The regulations may exempt from the operation of this Act or any specified provision of this Act any specified person, retail lease or retail shop or any specified class of persons, retail leases or retail shops, either unconditionally or subject to conditions.

Act binds Crown

83. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Proceedings for offences

84. Proceedings for an offence against this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Regulations

85. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Review of Act

86. (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

SCHEDULE 1—RETAIL SHOP BUSINESSES

(Sec.3)

Antique shops
Art galleries
Art supplies shops
Arts and crafts shops
Barbecue equipment shops
Barbers
Beauticians
Beauty therapists
Beauty shops
Beach wear shops
Beer, wine and spirit shops (except where goods are for consumption on the premises)
Bicycle shops
Bicycle accessories shops
Biscuit bar shops
Bookshops
Boot and shoe repairers
Bridal wear sales and hire shops
Building supplies shops
Business machines and equipment shops
Butcher shops
Cake shops
Camping equipment shops
Cards shops
Carpet shops
Cigarette shops
Clock shops
Coins and coin collections shops
Confectionery shops

SCHEDULE 1—RETAIL SHOP BUSINESSES—*continued*

Convenience food shops
Cookie shops
Copper fitting shops
Cosmetics shops
Costumes and formal wear hire shops
Curtain shops
Delicatessen shops
Department stores
Dinnerware shops
Disposals shops
Drapery shops
Dry cleaners
Duty free shops
Electrical appliance shops
Electronic equipment and supplies shops
Engravers
Equestrian wear shops
Equipment hire shops
Fast food shops
Fast-photo processors
Floor covering shops
Florist shops
Flower shops
Fruit and vegetable shops
Fruit juice shops
Furniture shops
Games and hobbies shops
General stores
Gift shops
Gift-wrapping shops

SCHEDULE 1—RETAIL SHOP BUSINESSES— *continued*

Grocery shops
Greengrocer shops
Haberdashery shops
Hairdressers
Hardware shops
Health food shops
Hearing aid shops
Hot bread kitchen shops
Hot water system shops
Household appliance shops
Household fixtures and fittings shops
Ice cream shops
Interior decoration shops
Jewellery shops
Key cutting shops
Kitchenware shops
Leather goods shops
Lighting shops
Linen shops
Lingerie shops
Lottery agencies
Manchester shops
Martial arts supplies shops
Mixed business shops
Motor vehicle and motor cycle accessories shops (excluding tyre shops and batteries shops)
Music shops
Newsagency shops
Nick-nack shops
Nut bar shops

SCHEDULE 1—RETAIL SHOP BUSINESSES—*continued*

Optometrists

Organ shops

Paint and paper shops

Pastry shops

Pet shops

Pharmacy shops

Photographic equipment and supplies shops

Picture frames shops

Plumbing supplies shops

Pools and spas shops

Poultry shops (whether fresh or frozen poultry or both fresh and frozen poultry)

Precious stones shops

Prints and posters shops

Restaurants, cafeterias, coffee lounges and other eating places

Rock shops

Rubber stamp supply shops

Seafood shops

Second-hand goods shops

Shoe shops

Shops selling or engaged in providing any 1 or more of the following goods or services in relation to men and boys:

accessories, caps, clothing, clothing alterations, sunshades

Shops selling or engaged in providing any 1 or more of the following goods or services in relation to women, girls and infants:

accessories, baby wear, bags, caps, clothing, clothing alterations, sunshades

Shops selling any 1 or more of the following goods:

~~cassettes~~, musical instruments, prerecorded tapes, records

Silverware shops

Sleepware shops

Smallgoods shops

Snack bars

SCHEDULE 1—RETAIL SHOP BUSINESSES—*continued*

Soft drink shops
 Soft furnishing shops
 Souvenir shops
 Sporting goods shops
 Stamps and stamp collection shops (whether for purchase or sale or both)
 Stationery shops
 Supermarkets
 Surfboard shops
 Surfing accessories shops
 Takeaway food shops
 Television, video equipment and other household appliances hire shops
 Tobacconists shops
 Toy shops
 Umbrella shops
 Underwear shops
 Variety stores
 Video tape and prerecorded music libraries
 Vitamin shops
 Wall decorations shops
 Watch shops
 Writing materials shops
 And other business as may from time to time be prescribed by the regulations.

SCHEDULE 2

(Sec. 11)

DISCLOSURE STATEMENT**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, If there is insufficient space on this form please attach additional sheets.

Retail Leases Act 1994 No. 46

SCHEDULE 2—continued

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.			
<p>Lessee has to pay for the finishes, fixtures, fittings, equipment and services to be provided by the lessor: yes / no.</p> <p>If yes, to what extent:</p>			
<p>Finishes, fixtures, fittings, equipment and services to be provided by the lessee.</p>			
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:			
<p>Method for Calculating Rent:</p> <ol style="list-style-type: none"> 1. Commencement Date 2. Formula 3. Rent Reviews <ul style="list-style-type: none"> Frequency Nature 			

*Retail Leases Act 1994 No. 46*SCHEDULE 2—*continued***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)			
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 Leases Act 1994 No. 46

SCHEDULE 2 —continued

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	Total 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		

Retail Leases Act 1994 No. 46

SCHEDULE 2 —*continued*

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.

*[Minister's second reading speech made in—
Legislative Assembly on 21 April 1994 a.m.
Legislative Council on 13 May 1994]*