



Small Business
Development Corporation

COMMON QUESTIONS ABOUT THE COMMERCIAL TENANCY ACT

4th Edition

*for leases entered into before 1 July 1999
(advice for landlords and tenants)*



COMMON QUESTIONS ABOUT THE COMMERCIAL TENANCY ACT

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DISCLAIMER

This publication has been prepared by the Small Business Development Corporation to provide general guidance and direction on the Commercial Tenancy (Retail Shops) Agreements Act 1985. The information contained herein is provided voluntarily as a service to our clients and is made available in good faith and is derived from sources believed to be reliable and accurate at the time of publishing. However, the information is provided solely on the basis that readers will be responsible for making their own assessment and that they should verify all relevant representations, statements and information. Neither the Corporation nor its officers take any responsibility for statements or representations, nor shall the Corporation or any of its officers be liable in respect of any such statement or representation, whether by reason of negligence, lack of care, or for any other reason whatsoever.

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The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (the Act) came into operation on 1 September 1985. The Act regulates commercial tenancy agreements of most retail premises in Western Australia. The primary objectives of the Act are to promote fair leasing arrangements, improve communication and provide access to low cost dispute resolution for the retail industry.

The Act has been amended on several occasions. Amendments are changes to the Act. Some amendments only affect new leases entered into on or after the amendments commenced, while other amendments apply to all leases. It is important to know the date your lease commenced so you will know which amendments apply to your lease. This will also help you to identify the Small Business Development Corporation publication that is relevant to your lease. Please refer to the table below.

On what date did you enter into your retail lease?	The SBDC publication relevant to your retail lease is:
On or after 1 September 1985 but before 1 July 1999.	Common questions about the Commercial Tenancy Act for leases entered into before 1 July 1999.
On or after 1 July 1999 but before 1 January 2013.	Common questions about the Commercial Tenancy Act for leases entered into on or after 1 July 1999 but before 1 January 2013.
On or after 1 January 2013.	Common questions about the Commercial Tenancy Act for leases entered into on or after 1 January 2013.

This publication is for retail leases entered into on or after 1 September 1985 but before 1 July 1999.

This publication provides information and general guidance on the Act and amendments to the Act up to and including the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011* (The 2011 Amendment Act) and the *Small Business and Retail Shop Legislation Amendment Act 2011*. The information provided in this publication is limited to the extent that the Act and its amendments applies to retail leases entered on or after 1 September 1985 but before 1 July 1999.

The Small Business and Retail Shop Legislation Amendment Act 2011, which became operational on 26 March 2012, establishes a Small Business Commissioner in Western Australia. The Small Business Commissioner, amongst other things, will assist small business operators to resolve complaints and disputes related to retail tenancies.

The Small Business Commissioner does not have the power to decide a retail tenancy matter (but can assist the parties to reach an agreement in an informal manner). The State Administrative Tribunal and the Courts have the responsibility and power to decide retail tenancy matters.

Retail leasing is a highly complex subject covering many possibilities. Consequently, the Act itself can be difficult to interpret. This publication, in a question and answer format, covers the essential parts of the Act. Its contents are generally in the same order as in the Act.

A NOTE OF CAUTION for tenants and landlords: DO NOT enter into ANY offer to lease, agreement for lease or a lease unless you are familiar, comfortable with and clearly understand the commercial ramifications of the various clauses of the document and the Act.

If you are uncertain, SEEK APPROPRIATE ADVICE.

For legal questions you should consult a solicitor. For commercial matters you may consult a specialist business advisor at the Small Business Development Corporation or any other appropriate adviser. The Small Business Development Corporation can be contacted on 13 12 49.

Tenants and landlords entering into retail shop leases for the first time are especially encouraged to seek professional advice and guidance.

This publication deals with the legislation applicable to leases entered into on or after 1 September 1985 but before 1 July 1999 as at 1 January 2013.

GENERAL CONDITIONS AND DEFINITIONS

Q: What is a lease?

A: Any lease, licence, or agreement that provides for occupation of premises in Western Australia.

Q: Does a lease have to be in writing?

A: No. A lease may be oral or written, or in some cases a combination of both. Written leases are strongly recommended to ensure that the rights and obligations of the parties to the lease are stated clearly and understood by the parties.

Q: How can a tenant be described?

A: A person, who under the lease is, or would be, entitled to occupy the premises the subject of the lease.

Q: What is a retail shop lease?

A: A retail shop lease is a lease that provides for the occupation of a retail shop unless:

- the tenant is a listed corporation or a subsidiary of a listed corporation; or
- the retail shop has a lettable area exceeding 1000 square metres.

This definition of retail shop lease applies from 1 January 2013.

Q: Are there any leases exempted from the Act by the Regulations that would otherwise be included as a retail shop lease?

A: No, for retail shop leases entered into before 1 January 2013.

For leases entered into on or after 1 January 2013 exempt from the Act are:

- a lease held by a listed corporation on the New Zealand Stock Exchange Limited or a subsidiary of such a corporation; and
- a lease of premises for the purpose of operating only a vending machine or automatic teller machine.

You should check the Regulations to ensure this has not changed since 1 January 2013.

Q: Why is it important to determine whether a lease is a retail shop lease?

A: The Act does not apply to leases that are not retail shop leases.

Q: Are there any exceptions?

A: Yes. *The Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (the Regulations) provide that certain leases, despite not conforming with the definition of retail shop lease, may be prescribed to be retail shop leases.

As at 1 January 2013 there were no exceptions. You should check the Regulations to ensure this has not changed since then.

Q: Are there any exemptions from the Act?

A: Yes. Certain persons, retail shop leases or retail shops may be exempted by regulation from all or any provisions of the Act.

Q: Are there any exemptions currently?

A: Yes. Exempted is a landlord, in respect of a retail shop lease, who is unable, because of the short lease period, to give the required notice notifying the tenant of the option to renew the lease. However the landlord must comply with alternative notice provisions set out in the exemption (see section in this publication titled "Obligation to Notify Tenant of An Option to Renew"). You should check the Regulations to ensure this has not changed since 1 January 2013.

Q: What is a retail shop?

A: In the Act 'retail shop' refers to two kinds of premises:

1. Those situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a business; or
2. Those not situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a retail business.

This definition of retail shop applies from 1 January 2013.

You should check the Regulations to ensure this has not changed 1 January 2013.

Q: Are there any premises excluded from the definition of retail shop?

A: Yes, excluded are premises used as a petrol station for leases entered into before:

- 30 November 1990; or
- 1 January 2013 that are leased from a landlord who is a party to a franchise agreement within the meaning of the expression in the *Petroleum Retail Marketing Franchise Act 1980 (Cth)*.

You should check the Regulations to ensure this has not changed since 1 January 2013.

Q: What is a retail shopping centre?

A: A cluster of premises five or more of which are used to carry on a retail business. The premises share the same landlord or comprise lots on a single strata plan.

This definition of retail shopping centre applies from 1 January 2013.

Q: What is a retail business?

A: A retail business is a business that wholly or predominantly involves the sale of goods by retail or is a specified business.

Q: What is a specified business?

A: A business prescribed by the Regulations to be a specified business for inclusion within the ambit of the Act.

Q: Are there currently any specified businesses?

A: Yes.

- On 16 February 1993 the following businesses became specified businesses:
 - drycleaning
 - hairdressing
 - beauty therapy
 - shoe repair
 - sale or rental of video tapes.
- On 1 January 2013 the following businesses became specified businesses:
 - beauty treatments
 - shoe repair (which may include key cutting and engraving)
 - sale or rental of DVDs
 - electronic games or other similar amusements.

The Regulations should be checked to see whether any other businesses have been added to or removed from the above list.

Q: What if a business operates from a retail shopping centre but does not carry on a retail business?

A: Even if a business is not a retail business it will be regarded as a retail shop, and therefore covered by the Act, if it is located in a retail shopping centre.

Q: What would be examples of a retail shop that would seem out of place with its accepted meaning?

A: A travel agency, a real estate agency, a dentist or an accountant are examples of businesses which are non retail and would not be covered by the Act unless situated in a retail shopping centre as defined in the Act. If such non-retail businesses were not located in a retail shopping centre the Act would not apply.

Q: Can a strata title development be classified as a retail shopping centre?

A: Yes, a retail shopping centre, as defined under the Act, can include strata title developments.

Q: Can a multi-level building be a shopping centre?

A: Yes, a retail shopping centre, as defined under the Act, can include a multi-level building.

Q: What if the premises are in a building which has five or more retail businesses but is built over two or more floor levels?

A: All businesses on levels where there is at least one retail business are retail shops.

Q: What does it mean for premises to be used wholly or predominantly for the carrying on of a business?

A: Wholly means that the premises are used entirely for business purposes. Generally, predominantly means that the premises are used mainly for business purposes.

Q: On the other hand, what does it mean for premises to be used wholly or predominantly for the carrying on of a retail business?

A: See the discussion of wholly or predominantly above for carrying on of a business. The crucial difference is that in this instance the premises must be used wholly or predominantly for the carrying on of a *retail* business (as defined in the Act) rather than simply a business.

Q: What is the lettable area of a retail shop?

A: The lettable area of a retail shop is as defined in the Regulations and must be calculated in the same, or substantially the same way, as other retail shops in the same group of premises.

The definition of lettable area as defined in the Regulations applies from 1 January 2013.

The Regulations should be checked to see whether the meaning of lettable area of a retail shop has changed since 1 January 2013.

Q: What is a group of premises?

A: A group of premises means:

- a retail shopping centre; or
- two or more premises (of which at least one must be a retail shop) that have a common lessor and are grouped together for the purposes of ascertaining variable outgoings.

To calculate the total lettable area of the group of premises the lettable area of the non-retail shops is as defined in the Regulations and is calculated in the same manner as for the retail shops.

Q: What if the lettable areas of the retail shop are on different levels?

A: All lettable areas are included in ascertaining the lettable area of the retail shop, even if those lettable areas are on different floor levels of the building.

Q: When does a lease commence?

A: When the tenant enters into possession of the premises or when the tenant starts to pay rent or, in the case of a written lease, when all parties have signed - whichever comes first.

Q: Are Government properties covered by the Act?

A: Yes, the Government is obligated both as landlord and tenant.

Q: How can a landlord be described?

A: A person who grants or is to grant to a tenant an entitlement to occupy the premises the subject of the lease OR a person who subsequently buys those premises.

Q: Does this mean that a buyer of retail premises has the same obligations to the tenant as the previous landlord?

A: Yes, particularly in respect of the provisions of the Act that provide for occupation of premises for up to five years.

DISCLOSURE

Q: What is the landlord entitled to know from the tenant before entering into a lease?

A: The Act does not specifically address this point. However, in practice, very few landlords will offer premises to tenants unless they are fully informed of the tenant's financial position, retail experience, and of the type and style of retailing proposed.

Q: What if the landlord has doubts about the information supplied by the tenant before the lease commences?

A: If both tenant and landlord have contracted to lease, then it is usually too late to withdraw, unless both parties agree. An owner is not obligated to lease premises to anyone. A landlord can choose the tenant.

Q: What is the tenant entitled to know before entering into a lease?

A: Every material matter that relates to the lease of the premises. This includes information relating to a retail shopping centre, zoning matters, proposed works, resumptions etc.

Q: Should tenants make their own inquiries regarding zoning matters, proposed works, resumptions etc?

A: Certainly, tenants should become as fully informed as possible themselves.

Q: How is the information presented to the tenant?

A: Under the Act the landlord should issue a document identified as a "Disclosure Statement".

Q: What information will be on the Disclosure Statement?

A: All that was agreed during the initial negotiations together with all matters that the prescribed Disclosure Statement requires to be fully addressed.

Q: What would be some examples apart from rent, length of lease and rent reviews?

A: The landlord might disclose the pedestrian flow, proposed road changes, the proximity of a newsagency and pharmacy to a proposed shop, and a landlord's financial commitment to promotions.

Q: Should the Disclosure Statement be in the prescribed form?

A: The Act says that the Disclosure Statement shall be in the prescribed form.

Q: Where is the form of the Disclosure Statement available?

A: From the Small Business Development Corporation at Level 2, 140 William Street, Perth or call 13 12 49).

Q: Who should complete the Disclosure Statement?

A: It can be completed by either party but is nearly always by the landlord or the landlord's agent.

Q: If the parties agree on special conditions, eg. rent free periods at start up, should such details appear on the Disclosure Statement?

A: Certainly. All relevant agreements should be listed. Note: There may be taxation implications with such special conditions.

Q: When should a Disclosure Statement be issued?

A: At least 7 days before the entering into the lease.

Q: Should a Disclosure Statement be issued on the renewal of a lease?

A: Yes, because the renewal constitutes a new lease. However a Disclosure Statement is not required when a lease is renewed pursuant to an option in an existing lease, as opposed to a renewal that is a new agreement.

Q: If a Disclosure Statement is not provided, what redress is there for the tenant?

A: For leases entered into on or after 30 November 1990, the tenant may terminate the lease in writing within 60 days, or claim for losses suffered by applying to the State Administrative Tribunal, or follow both of these alternatives.

Q: What if the tenant receives a Disclosure Statement but finds false or misleading information has been given?

A: Once again, the tenant can terminate the lease in writing within 60 days or claim compensation or follow both of these alternatives for leases entered into on or after 30 November 1990.

It is important to note that BEFORE the tenant can apply to the State Administrative Tribunal for compensation the tenant must first attempt to resolve the matter through the Small Business Commissioner.

Q: Is the onus on the tenant to prove that the information is false or misleading?

A: Yes, the tenant must have significant evidence of proof.

Q: Who assesses the compensation?

A: The State Administrative Tribunal.

Q: What precautions need to be taken by the tenant before signing the Disclosure Statement?

A: Make sure all aspects of the lease are understood. Legal advice is strongly recommended.

Q: What precautions need to be taken by the landlord before signing the Disclosure Statement?

A: Make sure the information on the Disclosure Statement is not false or misleading. Legal advice is strongly recommended.

Q: What if the landlord finds false or misleading information has been given by the tenant?

A: The tenant should be careful to give correct information as the landlord could seek redress under common law.

Q: Does the Disclosure Statement refer to legal advice?

A: Yes, the statement will notify the tenant that independent legal advice should be sought, prior to any commitment to lease.

Q: If a tenant terminates a lease for Disclosure Statement breaches, when does the termination take place?

A: Fourteen days after the notification of termination is served on the landlord.

Q: Is a Disclosure Statement required for the renewal of the term of the lease pursuant to an option or an assignment of a lease?

A: No Disclosure Statement is required. This has been clarified by the amendments effective from 30 November 1990.

Q: Can further information be added to the Disclosure Statement?

A: Yes, additions can be made on the agreement of parties to the lease.

Q: What happens if the parties to a lease enter into an agreement or arrangement that would be void if it was included in the lease?

A: The provision would be considered to be part of the lease and the Act would apply accordingly. That is, the provision would be void.

Q: What would be an example of such an arrangement?

A: A deed or agreement outside the lease to pay key-money for a new lease.

Q: What recourse does a tenant have where the landlord misleads the tenant and the facts do not materialise until after the expiry of 60 days for leases entered into on or after 30 November 1990?

A: The State Administrative Tribunal has the power to award compensation and/or alter the terms of a lease if it is satisfied that the tenant was misled at the appropriate time and has suffered or is likely to suffer a pecuniary loss.

Q: What about earlier leases (1 September 1985 to 29 November 1990) in this context if 28 days have expired?

A: The State Administrative Tribunal has the power to award compensation if it is satisfied that the tenant has been misled and has suffered a pecuniary loss.

It is important to note that **BEFORE** the tenant can apply to the State Administrative Tribunal for compensation the tenant must first attempt to resolve the matter through the Small Business Commissioner.

Q: What if the tenant was induced to sign a lease based on the representation of the landlord or the landlord's agent that a certain level of pedestrian traffic could reasonably or actually be anticipated?

A: If the tenant can show that the information was false or misleading there may be a case against the landlord providing a monetary loss can be proved.

RENT BASED ON TURNOVER

Q: What is meant by rent based on turnover?

A: This is rent calculated as a percentage of the gross sales of the business.

Q: Is this also described as percentage (%) rent?

A: Yes, that is the usual terminology.

Q: At first glance the concept of percentage rent could appear to be onerous on tenants. Do tenants share this view?

A: Not necessarily. Some tenants are quite content with percentage rent. Generally, in a well managed shopping centre, tenants who pay percentage rent have profitable businesses.

Q: Can a landlord charge a tenant percentage rent?

A: Yes, but only with the prior permission in writing from the tenant and based on an agreed formula.

Q: How does a tenant give permission to the landlord to charge percentage rent?

A: By completing the prescribed form "Notice of Election that Rent be Determined by Reference to Turnover" (Form 2).

Q: Where can a Form 2 be obtained?

A: On the Internet at www.commerce.wa.gov.au, click on the "Consumer Protection" tab, use the drop down menu under "Business" to access "Commercial tenancy and retail shops", click on "forms". If you are unable to access the forms, contact the Small Business Development Corporation at Level 2, 140 William Street, Perth or call 13 12 49.

Q: Does the percentage rent encompass the whole of the rent?

A: Not necessarily. The percentage rent could be whole or part of the total rent - usually additional rent above base rent.

Q: If the percentage rent is payable over and above the base rent, then how does it work?

A: This is best shown by an example. Base rent is \$50,000 per annum Percentage rent 8% (agreed to by the relevant parties and based on the type of retailing). Divide \$50,000 by 8% (0.08) to get \$625,000 (threshold). If the gross takings are \$700,000 the percentage rent is 8% of \$75,000 (\$700,000 - \$625,000) which is \$6,000. Hence the total rent is \$56,000 (\$50,000 + \$6,000). There are also other ways of applying percentage rent which suits particular landlords and tenants.

Q: Would the 8% used in the example be applicable to most types of retailing?

A: No, the figure could be significantly more or less depending on the gross percentage margin of the business.

Q: Does the lease have to specify the formula by which the percentage rent is to be determined?

A: Yes, otherwise the percentage rent clause is void.

Q: If the tenant has agreed to pay percentage rent, then the landlord will require the tenant's sales figures - is this correct?

A: Yes, the tenant will have to supply turnover figures within 14 days of the end of each month or by some other agreement. The tenant will also need to supply figures from their accountant showing the annual turnover within 42 days of the end of that relevant financial year.

Q: Might not a tenant be concerned about confidentiality when releasing sales figures to a landlord?

A: Possibly, but the landlord cannot use the figures for any purpose other than calculating percentage rent.

Q: What if the landlord does use the figures for other than calculating percentage rent, eg. breaching confidentiality by publicly revealing the figures?

A: Then the tenant does not have to supply the figures any more.

Q: What happens if the landlord has reason to believe that the turnover figures supplied are incorrect?

A: The landlord has the right to have an accountant audit the sales figures.

Q: Who pays for the accountant to do the audit?

A: The landlord. However the tenant must reimburse the landlord if the sales have been shown to be understated by more than 5%.

Q: Are there exclusions from the turnover figures supplied by the tenant?

A: Yes, the following can be excluded: net amounts of discounts, losses incurred in resale of trade-ins, written off bad debts, refunds on returns, cancelled lay-bys, consumption tax imposed on the purchase price, delivery charges, asset sales such as fittings and fixtures, price of goods returned to wholesalers and receipts from Lotto and agencies other than commission.

Q: Can a tenant release sales figures to the landlord (other than for percentage rent purposes)?

A: Certainly. Some traders like to know how tenants are performing against certain trends known to the landlord and releasing figures is part of achieving that knowledge.

Q: What is the case if a lease clause states that turnover figures are required but there is no percentage rent provision and the lessee signs the lease document?

A: The clause on revealing figures is void, so there is no obligation on the tenant.

KEY-MONEY

Q: What is key-money in relation to a retail shop tenancy?

A: Money, or any other benefit, paid to the landlord or at the landlord's direction in connection with the granting, assigning or renewal of a lease.

Q: Are there other terms to describe key-money?

A: Sometimes key-money is referred to as goodwill or, in the case of the liquor industry, premium payments.

Q: Isn't goodwill different from key-money in relation to retail tenancies?

A: Yes, goodwill means an intangible saleable asset arising from the reputation of the business, the relations formed with customers of the business and the nature of the location of the business.

Q: Under the Act can a landlord charge key-money for a new lease or assignment of a lease?

A: No, key-money cannot be charged.

Q: Under the Act can a landlord charge goodwill for a new lease or assignment of a lease?

A: No, except where the landlord is selling a business that the landlord owns and is granting the purchaser a lease of the premises that the landlord owns.

Q: What would be an example of a landlord receiving goodwill legitimately?

A: A landlord could be running a newsagency from a shop that the landlord owns. If the landlord decides to retire and sell the business but lease the premises from which the business is conducted, then the landlord can charge goodwill in respect of the sale of the business. However, the landlord would not be entitled to receive key-money for issuing the lease.

Q: Is it possible for the landlord to disguise key-money as prepaid rent?

A: No. If there is any doubt, the onus will be on the landlord to prove that the payment is not key-money. This applies to leases entered into on or after 30 November 1990, but not leases entered into before that date.

Q: Can a landlord recoup expenses for investigating a proposed assignee of a tenant?

A: Yes, these expenses are not classed as key-money.

Q: Can a tenant recover key-money unwittingly paid for in a lease entered into after 1st September 1985?

A: Yes, through the State Administrative Tribunal or a court of competent jurisdiction.

It is important to note that BEFORE the tenant can apply to the State Administrative Tribunal to recover any key-money the tenant must first attempt to resolve the matter through the Small Business Commissioner.

Q: A tenant sells the business and receives goodwill from the assignee. Is this a problem under the Act?

A: No, a tenant is entitled to sell a business and receive a goodwill payment.

Q: A tenant runs into financial difficulty and closes the shop, clearing out the contents. After receiving a payment, the lease on the vacant shop is assigned. Is the payment classed as key-money under the Act?

A: No, as the tenant is receiving the payment and not the landlord. However, the landlord's consent to the assignment is required and cannot be unreasonably withheld.

ASSIGNMENT AND SUB-LEASING

Q: In respect of an assignment or sub-lease, is the date of the lease significant?

A: Yes, the Act has been amended and leases entered into on or after 30 November 1990 are bound by new clauses in the legislation.

Q: What is the position regarding leases entered into after 1 September 1985 and up to 29 November 1990?

A: Unless otherwise agreed, and provided the Act permits it, the parties must comply with the clauses in the lease. Consent is assumed if the application for assignment has not been responded to within 42 days.

Q: How will it be different for leases entered into on or after 30 November 1990?

A: Every commercial tenancy agreement covered by the Act will provide for assignment of the lease, subject only to a right of the landlord to withhold consent on reasonable grounds.

Q: What happens if a tenant asks the landlord in writing to approve an assignment and the landlord fails to answer the request?

A: Consent is assumed if 42 days (pre 30 November 1990 leases) or 28 days (post 29 November 1990 leases) have passed and there is no reply from the landlord.

Q: Should a request for assignment/ sub-lease be in writing?

A: Yes, the Act specifies that the request be in writing.

Q: Many leases provide a clause to the effect that the tenant will pay the monetary lease commitments of an assignee if the assignee defaults. Does this practice still apply?

A: Such clauses are void for leases entered into on or after 30 November 1990. However for leases entered into before that date, the lease clause would prevail.

Q: Who pays the legal and statutory costs (including stamp duty) of the assignment?

A: This is not covered in the Act but is subject to negotiation between the parties involved. The usual practice is for the assignee to bear the costs of the assignor and of the landlord.

RENT AND RENT REVIEWS

Q: Is there any regulation in the Act over the rent to be paid at the start of a lease?

A: No, this is a matter of negotiation between the parties involved.

Q: If the lease provides for a review of the rent, do the reviews have to occur annually?

A: No, rent reviews can take place every 6 months, 1 year, 18 months, 2 years, or on whatever basis that the parties have agreed.

Q: When the rent review time arrives can the landlord increase the rent to any amount at the landlord's discretion?

A: No. The rent cannot be increased unless the lease specifies the basis on which or the formula by which the review is to be made.

Q: What is an example of a "basis" or "formula"?

A: The usual methods used to increase rent are (1) market rent; (2) directly relating to the Consumer Price Index; (3) a fixed percentage increase; or (4) a fixed monetary increase.

Q: Can there be an alternative of say market rent, CPI and a fixed percentage?

A: Yes, if both parties have agreed prior to them entering into the lease.

Q: Can leases contain clauses that indicate that the rent can never be reduced?

A: Yes, but only if the tenant has agreed to such a clause prior to entering into the lease.

Q: Can leases contain clauses that determine a maximum or minimum increase?

A: Yes, but again only if both landlord and tenant have agreed prior to them entering into the lease.

Q: What happens if a lease does not provide a method of rental increase at review time?

A: The landlord cannot increase the rent unless the tenant agrees.

Q: What is market rent?

A: Market rent is defined in the Act as "the rent obtainable at the time of the review in a free and open market if the premises were unoccupied and offered for rental for a use permitted by, and on the same terms as are contained in, the current lease".

Note that a calculation of market rent cannot take into account the value of:

- the goodwill of the business; or
- any stock, fixtures or fittings in the retail shop that are not the property of the landlord; or
- any structural improvements, or alteration, of the retail shop carried out, or paid for, by the current tenant.

Q: Is it mandatory to use the Act's definition of market rent?

A: Yes, for leases entered into on or after 30 November 1990, but not for leases entered into prior to that date.

Q: What happened before 30 November 1990?

A: Landlords could use their own or the Act's definition of market rent in lease documents.

Q: If the lease provides for a review of rent (which could involve extensive negotiations) and at the conclusion of the rent review the parties do not agree with the new rent, what avenues are open to challenge the new figure?

A: The issue can be resolved by:

- a licensed valuer who is agreed to by both parties; or
- a licensed valuer nominated, at the request of both parties, by the Small Business Commissioner; or
- two licensed valuers, one appointed by the tenant and one by the landlord.

Q: Is the landlord obliged to provide any information to the valuer/s to assist in determining the rent payable?

A: Yes.

Q: What information must the landlord provide to a valuer/s to assist in determining the rent payable?

A: The relevant information about leases for retail shops in the same building or centre on request including:

- current rental for each lease;
- rent free periods or any other form of incentive;
- recent or proposed variations of any lease;
- outgoings for each lease; and
- any other information set out in the Regulations.

Q: What if the landlord fails to supply the information?

A: If the landlord does not have a reasonable excuse, the valuer must notify the tenant in writing of the failure within seven days. The tenant may apply to the State Administrative Tribunal for an order that the landlord comply with the request to supply the information.

Q. Does the information have to remain confidential?

A: Yes, unless the information was provided in specified circumstances set out in the Act or was already publicly available.

Q: Is a valuer obliged to provide confidential information to the Small Business Commissioner?

A: Yes, a licensed valuer with confidential information obtained in relation to a rent review may disclose the information to the Commissioner, if required in relation to a request for assistance or alternative dispute resolution.

Q: What are the consequences of unauthorised disclosure of information?

A: If unauthorised disclosure causes loss or damage compensation may be payable. The parties may reach agreement themselves as to the amount of compensation, or if agreement cannot be reached, may apply to the State Administrative Tribunal.

It is important to note that BEFORE the tenant or landlord can apply to the State Administrative Tribunal for compensation an attempt must first be made to resolve the matter through the Small Business Commissioner.

Q: On a market rent review, if the landlord and tenant do not agree on what the rent is to be, what rent is payable?

A: The existing rent is maintained and continues to be payable until the market rent dispute is determined. Once it is determined, the reviewed rent becomes due and payable as from the date that the rent review was due.

Q: Are the valuers in question required to give written reports on how they arrived at their decision?

A: Yes, on request of either of the parties to the lease and after payment of their fees.

Q: Who pays the valuer's fees?

A: The Act is silent on this point. Normally the fees are shared between the parties or as the lease otherwise provides.

Q: What happens if the two valuers cannot agree on a new market rent?

A: The question can be determined by the State Administrative Tribunal but BEFORE making an application to the State Administrative Tribunal the parties must attempt to resolve the matter through the Small Business Commissioner.

Q: What can the State Administrative Tribunal do when determining the rent in a market rent review dispute?

A: The State Administrative Tribunal is not bound by the rules of evidence, but is required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. The State Administrative Tribunal may inform itself on any matter in such manner as it sees fit.

Q: In determining the rent payable on a market rent review what can the State Administrative Tribunal make the parties do?

A: The State Administrative Tribunal can require the parties to provide valuations (by licensed valuers) and any other documents and information that the State Administrative Tribunal considers appropriate.

Q: Can a landlord charge interest on overdue rent?

A: Yes, the Act does not prohibit such a charge, but it must be clearly disclosed and specifically provided for in the lease.

VARIABLE OUTGOINGS – CONTRIBUTION TO LANDLORD’S EXPENSES

Q: What are variable outgoings?

A: Also called operating expenses, they are the expenses of the landlord in operating, repairing, or maintaining:

- a building of which the retail shop forms the whole or part; or
- a retail shopping centre, the building or buildings of which the retail shop forms a whole or a part, and the common area.

Q: What would be generally included under variable outgoings?

A: Statutory payments (for example council rates water and sewerage rates), insurance premiums for the building, air conditioning, cleaning expenses, fire protection, pest control, repairs and maintenance, security costs, rubbish removal and sewerage disposal, music systems, signs, gardening and landscaping, parking, and like expenses.

Q: Does the lease need to specify each item of the variable outgoings?

A: Yes, otherwise they cannot be charged to the tenant. They are usually listed in the main body of the lease.

Q: Would a general clause similar to “all other expenses incurred in operating the centre” be satisfactory?

A: No, all variable outgoing expenses must be clearly specified in the lease, ie they must be individually listed under each relevant category of outgoing.

Q: Is the tenant entitled to know how each item of variable outgoing is determined?

A: Yes, this is required to be set out in the lease. The tenant should be able to determine contributions to each variable outgoings item.

Q: Are tenants entitled to know how the variable outgoings are apportioned?

A: Yes, eg in many cases the variable outgoings are apportioned according to the area that the leased premises bears to the total lettable area.

Q: Should tenants be told how and when the variable outgoings are to be paid?

A: Yes, this should be set out in the lease. Payments are typically paid monthly.

Q: How is the lettable area of a retail shop calculated?

A: The Regulations set out how the lettable area of a retail shop is calculated. The lettable area must be calculated in the same way as other retail shops in the same group of premises. The definition of lettable area as defined in the Regulations applies from 1 January 2013.

Q: What is a group of premises?

A: A group of premises is two or more premises **one of which is a retail shop** which have a common lessor and are grouped together for the purposes of allocating variable outgoings.

Q: What if the lettable areas of the retail shop are on different levels?

A: All lettable areas are included even if they are on different levels.

Q: How is the lettable area for non-retail shops calculated?

A: The lettable area of non-retail shops is calculated in such manner as is prescribed by the Regulations.

Q: Should tenants be provided with an itemised budget at the start of the financial year?

A: Yes, the landlord's agent should have this document ready one month before commencement of outgoing's financial year.

Q: What if tenants are not given an itemised budget?

A: They do not have to pay any variable outgoing's until one month after they are given the budget. If no budget is ever given, then there is no liability to pay variable outgoing's.

Q: What if there is a dispute between tenant and landlord regarding outgoing's?

A: In the event of a dispute the parties must first attempt to resolve the matter through the Small Business Commissioner and, if the dispute cannot be resolved, it may be referred to the State Administrative Tribunal.

Q: How are tenants made aware that the outgoing's have been correctly spent?

A: The tenants are entitled to an audited statement of expenditure incurred under each item of expenses specified in the lease, within 3 months of the end of the financial year to which the expenses relate.

Q: Must the tenant pay the landlord's variable outgoing's as a separate cost?

A: No, if the parties agree, the lease can provide for:

- a gross rent to be paid which includes the rent and all other costs of the landlord in leasing to the tenant the building or shopping centre as a fixed amount;
- a semi gross rent which provides for a payment of rent together with a limited number of variable outgoing's such as local government rates and taxes, water authority rates and taxes and charges, and land tax; or
- some other variation.

SINKING FUND

Q: What is a sinking fund?

A: Generally a fund, the purpose of which is usually to pay for replacement capital items at some future date.

Q: Could you have sinking funds for other purposes?

A: Generally sinking funds can be for any specific purpose that requires a future cash sum, they usually apply to items of capital expense, although they can apply to items of revenue expense.

Q: Are sinking funds generally permitted in leases under the Act?

A: Yes, but only for leases entered into before 30 November 1990, unless it is a sinking fund for future non capital expenses, in which case such a sinking fund is in order, even after 30 November 1990.

Q: Does this mean that sinking fund clauses in leases entered into on or after 30 November 1990 are void?

A: Only sinking fund clauses that allow the landlord to recover from the tenant contributions towards the cost of:

- construction of the shopping centre;
- extension or structural improvement of the shopping centre; or
- any plant or equipment that is or becomes the landlord's property are prohibited.

Q: Does this clause apply to all retailers?

A: No, only to retailers in retail shopping centres (a collection of 5 or more retail shops with the same landlord).

Q: What if a tenant was paying into a sinking fund under a lease entered into before 30 November 1990?

A: The tenant under that lease and any renewal of that lease under an option granted before 1 September 1985 must continue to pay into the fund no matter whether it is for future capital works or includes amounts for future capital works.

RIGHT TO A FIVE YEAR TENANCY

Q: A tenant, entering into a new lease in a retail shop, requires a lease period suitable to the tenant's business needs. What period is available under the Act?

A: The Act entitles the tenant to a minimum tenancy period of up to 5 years. Subject to what is discussed below, where the total of the lease period and any options to renew under the lease is less than 5 years, the tenant has the right to exercise an option under the Act to renew the lease for any period to enable a total period of up to 5 years.

Q: Can the 5 years or more be made up with option periods?

A: Yes, the lease could be 3 years with a 3 year option or 4 years with a 1 year option or 4 years with a 4 year option or whatever is agreed between the parties.

Q: Does an assignee have a right to a 5 year tenancy?

A: No, the assignee may only be granted the balance of the lease to which the assignor was entitled under the lease, plus any unused option contained in the lease, or the balance of any statutory option available.

Q: If a tenant has been given an initial term including options of less than 5 years, what procedure is available to extend the period?

A: The tenant should give notice to the landlord on the prescribed form (Regulation 6 Form 3) within the required time to exercise the statutory option (ie. The balance of the 5 year period).

Q: Is there a time limit for invoking the statutory option?

A: Yes, notice should be given to and served on the landlord not less than 90 days before the expiry of the current term.

Q: Can the 90 day clause be reduced?

A: Yes, but only at the discretion of the State Administrative Tribunal.

Q: What if there is an unremedied default by the tenant (eg. rent arrears) under the lease?

A: The default must be remedied before the statutory option can be exercised.

Q: How are disputes about the statutory option resolved?

A: The question can be determined by the State Administrative Tribunal but BEFORE making an application to the State Administrative Tribunal the parties must attempt to resolve the matter through the Small Business Commissioner.

Q: Do the terms of the Act apply to sub-leases?

A: Yes, but only to the extent that they are consistent with what applies to the head lease; eg, a statutory option could not extend past the expiry date of the head lease, even if it is less than 5 years in duration.

Q: Can a Landlord and tenant agree to a lease that is shorter than 5 years, and the tenant waive the right to the balance of the statutory 5 year period?

A: Yes, but the tenant must first seek the State Administrative Tribunal's approval with a written application.

Q: What effect does this have if the landlord and tenant agree to say 3 years and the State Administrative Tribunal's approval is obtained?

A: The tenant will not be allowed to exercise the statutory option if there is a change of mind later in the lease; eg, after two and a half years the tenant cannot then expect the 5 year term after previously agreeing to a 3 year term having obtained the State Administrative Tribunal's approval to the 3 year term.

Q: Can an assignee exercise a statutory option if such a course was available to the assignor?

A: Yes, but the statutory option period available to the assignee is limited to the period that was available to the assignor immediately prior to the assignment.

Q: Will the tenant's rights to the statutory option be affected by a change of landlord?

A: No, they are protected by the Act. The definition of landlord includes anyone who acquires the landlord's interest in the premises.

Q: Clearly the intention of the Act is for a tenant to receive at least 5 years occupancy but what if the tenant defaults on a lease clause before the 5 years has elapsed?

A: In this case the landlord is entitled to terminate the lease at the time of default which will effectively reduce the 5 year period.

Q: In the case of a sublease, can the tenant expect 5 years if such a term is inconsistent with that of the head lease?

A: No, the tenant can only receive a term that is consistent with the term of the head lease.

Q: Is there any other way in which a landlord can terminate a lease in less than 5 years?

A: Yes. First the tenant must agree. Secondly, the State Administrative Tribunal must approve in writing the inclusion in the lease of any provision that allows the landlord to terminate the lease at a time which is prior to the expiry date of the lease (including any extension of the expiry date that could have been obtained by exercise of the statutory option).

Q: What would be some examples of such provisions?

A: Total or partial destruction of a shopping centre by fire or earthquake, the landlord wishing to redevelop/refurbish the centre totally or partially. This list is not exhaustive.

Q: Is there a name for these types of occurrences?

A: Under the Act they are called “special circumstances”.

Q: Who decides what is a “special circumstance”?

A: The State Administrative Tribunal.

Q: If a lease has a redevelopment clause that allows the landlord to give the tenant 6 months notice of termination where the landlord is going to redevelop or refurbish the shopping centre and has the State Administrative Tribunal’s approval, wouldn’t that have the potential to reduce the term of the lease?

A: Yes, the lease term could be determined with say a 6 months notice and be reduced to less than the term provided for in the lease. This could also cut out any option contained in the lease or any statutory option to renew the lease.

Q: Surely that could have a significant effect on the value of a retail business in its first 5 years of operation?

A: In some cases yes, the tenant could lose his business and be left with substantial debts with no compensation from the landlord. In other cases, especially with older buildings, the tenant might welcome an agreement from a landlord to lease an alternative shop in the redeveloped premises.

Q: Are redevelopment clauses covered under the Act?

A: Not specifically. The implications of any redevelopment clause in a lease require to be clearly understood. The tenant needs to determine whether the clause is acceptable or conditions negotiated so that the tenant’s interests will be protected.

Q: When is the best time to conduct such negotiations?

A: At the disclosure stage, before entering into a binding commitment to take premises on lease.

NOTICE AS TO RENEWAL OF LEASES

Q: Does a landlord have to renew a lease after its expiration if 5 years have elapsed?

A: No. There is no obligation for a landlord to grant a new lease to the existing tenant, unless the lease itself contains such an obligation.

Q: But what if the tenant has a valuable business and wants a new lease in order to continue business at the premises?

A: The landlord is under no obligation to renew any lease that has expired. However, if there is an unused option contained in the lease it may be exercised.

Q: Can the landlord ask for a monetary consideration for the granting of a new lease?

A: No, such payments are prohibited under the Act, as they would be classed as key-money.

Q: The issue of lease renewal would be of major concern to many retailers. Does the Act recognise the potential problems relating to renewals?

A: Yes, but only in respect of leases entered into on or after 30 November 1990.

Q: For those particular leases entered into on or after 30 November 1990, how does the Act address the issue?

A: At any time during the twelve months before the end of the lease the tenant can write to the landlord seeking clarification as to whether a new lease will be offered. If there are provisions in the lease, granting further lease options though, then the procedures set forth in the lease must be followed.

Q: What if the landlord says no?

A: The tenant will have up to one year to assign the lease, re-locate to alternative premises or find some other solution to the problem.

Q: What if the landlord says yes?

A: The landlord will be bound by that decision, which must be in writing.

Q: How long has the landlord to reply in writing to the request?

A: Thirty days.

Q: What if the landlord doesn't reply to the request?

A: Then the term of the lease is extended by the period of non-compliance, eg. if the landlord took 100 days to respond, the lease would be extended by 70 days.

Q: Does this extension mean the tenant is 'locked in' to the lease extension?

A: No, the tenant can terminate the lease if he or she wants to do so.

Q: When does the landlord have to specify the rent to be charged at the time of the commencement of the new lease?

A: Not less than three months before the expiry of the current lease term.

Q: What if the tenant does not write to the landlord requesting clarification of whether a new lease will be available?

A: The landlord is under no obligation in respect of granting a new lease.

Q: If my lease is renewed after the original term of the lease expires, from when will my new lease commence?

A: If a lease is renewed after the original term of the lease ends, the lease for the new term commences on the expiry of the term of the original lease.

OBLIGATION TO NOTIFY TENANT OF AN OPTION TO RENEW

Q: If a lease contains an option to renew, does a landlord have to remind a tenant of the option expiry date?

A: Yes, the landlord must notify a tenant in writing at least six months and no more than 12 months prior to the option expiry date.

Q: What happens if the landlord does not notify the tenant?

A: The option expiry date is taken to be six months after the landlord notifies the tenant as required.

Q: If the lease is extended because of the landlord's failure to notify the tenant of the option expiry date, can the tenant terminate the lease?

A: Yes.

Q: Some landlords will be unable to give the tenant the required notice as there is not enough time before the option must be exercised under the lease. What happens in these situations?

A: The Regulations set out different notice periods for these situations.

Q: To which leases do different notice periods apply to?

A: Different notice periods apply in two situations:

1. to leases requiring an exercise of the option to renew the lease before 1 January 2014; and
2. if the landlord cannot give the required notice because of the short lease period.

Advice should be sought for these leases.

Q: In the second situation mentioned above, if the landlord cannot give the required notice to the tenant in writing prior to the option expiry date because of the short lease period what is the landlord required to do?

A: The landlord is required to notify the tenant in writing of the option expiry date on or before the commencement of the current term of the lease.

Q: What is an example of a lease that the Act allows the landlord to give a shorter notice period prior to the option expiry date because of the short lease period?

A: An example is a five month lease with a two year option to renew the lease and the tenant must exercise the option three months before the end of the five month lease. In that case the landlord is required to notify the tenant in writing of the option expiry date on or before the commencement of the five month term of the lease.

COMPENSATION BY THE LANDLORD

Q: Is it possible for a tenant to get compensation from a landlord apart from matters not necessarily relating to the Disclosure Statement?

A: Yes, for inhibiting access of the tenant to the shop, for taking action to inhibit the flow of customers to the shop, for disturbing trading, for not repairing equipment and for not keeping up cleanliness and maintenance of the building or any common areas.

Q: Is such compensation available to all tenants?

A: No, only for tenants in retail shopping centres (a collection of 5 or more retail shops with the same landlord).

Q: What is the procedure if a tenant has a grievance that could lead to compensation?

A: The tenant must give written notice to and serve the written notice on the landlord to rectify the matter within such time as is reasonably practicable.

Q: If the matter is not rectified, how is liability and the amount of compensation determined?

A: If the landlord does not rectify the matter within a reasonable time, the landlord is liable to compensate the tenant. The amount of compensation may be agreed, in writing, by the landlord and tenant or as determined by the State Administrative Tribunal but BEFORE making an application to the State Administrative Tribunal for compensation the tenant must attempt to resolve the matter through the Small Business Commissioner.

Q: What should the tenant do in preparation for a claim for compensation?

A: Clearly quantify the compensation claim and support it by revealing detailed sales changes, reduced gross profits, increased expenses and the overall effect on net profits, and show that the cause of the damage suffered is attributable to the landlord's action or inaction.

LIABILITY FOR LEGAL OR OTHER RELATED EXPENSES ASSOCIATED WITH THE LEASE

Q: Can the landlord claim legal or other related expenses from the tenant or any other person related to entering into the lease?

A: Generally, no. A landlord is not able to claim from any person, including the tenant, the landlord's legal or other expenses relating to:

- the negotiation, preparation or execution of the lease, or the renewal of the lease or an extension of the lease; or
- obtaining the consent of the mortgagee to the lease; or
- the landlord's compliance with the Act.

Q: Can any legal or other expenses be claimed by the landlord for an assignment of the lease or a sub-lease?

A: Yes, reasonable expenses in relation to an assignment of a lease or a sub-lease.

ACT PREVAILS

Q: Can parties to leases contract out of the Act?

A: No, any clause in a lease that is contrary to any provision of the Act is void.

Q: But what if the landlord and the tenant are happy with a void clause?

A: This might be all right in practice but there are many factors that can upset an arrangement like this and lead to difficulties. For example, the landlord can change, the lease is assigned or one or the other of the parties changes their mind.

Q: What would be an example to illustrate this point?

A: A landlord or their agent might orally request that a tenant pay key-money for a lease in a new shopping centre and the tenant agrees to pay. However, some time later the parties fallout over some issue and the tenant decides to ask for his key-money to be returned.

Q: Can the tenant expect the key-money to be returned?

A: Yes, the tenant can expect a full refund - if key-money has been paid.

Q: How is this possible with no written agreement?

A: The Act provides that a written or oral agreement or arrangement that contains a provision which, if contained in the retail shop lease would be void, then that provision is deemed to be contained in the lease and the Act will apply accordingly.

Q: What if such an oral agreement took place after the lease was entered into?

A: Under the Act it is immaterial whether the agreement took place before or after the entering into the lease.

UNCONSCIONABLE CONDUCT AND MISLEADING OR DECEPTIVE CONDUCT

Q: Why does the Act contain prohibitions on unconscionable conduct and misleading or deceptive conduct?

A: A retail lease is a commercial transaction between a landlord and a tenant. As a general rule, there is no expectation that parties to a commercial transaction have to be 'nice' to each other; business is business. However, the law recognises that one party should not be subjected to harsh, oppressive or deceitful conduct by the other party. Therefore, the Act prohibits unconscionable conduct and misleading or deceptive conduct.

Q: Is there a difference between unconscionable conduct and misleading or deceptive conduct?

A: Yes, although the terms bear some similarity they are quite distinct.

UNCONSCIONABLE CONDUCT

Q: What is unconscionable conduct?

A: Unconscionable conduct deals with harsh and oppressive conduct in business transactions. Generally defined, it is conduct which is so unreasonable that it goes against good conscience.

Q: Does the Act define unconscionable conduct?

A: No, the Act does not define unconscionable conduct. Unconscionable conduct is a developing area and the State Administrative Tribunal has the power to take into account all matters that it considers relevant in deciding whether unconscionable conduct has occurred.

Q: Does the Act prohibit unconscionable conduct?

A: The Act prohibits unconscionable conduct by both landlords and tenants and provides for a non-exhaustive list of matters to be considered by the State Administrative Tribunal in determining whether unconscionable conduct has occurred.

The matters the State Administrative Tribunal may consider when determining whether a landlord has acted unconscionably include the following:

- the relative bargaining strengths of the landlord and tenant;
- whether the landlord forced the tenant to engage in conduct that was not necessary for the protection of the landlord's interest;
- if the tenant was able to understand any documents relating to the lease;
- whether the landlord exerted undue influence or pressure or any unfair tactics were used against the tenant;
- the extent to which the landlord was willing to negotiate terms and conditions of the lease;
- the extent to which the landlord was reasonably willing to negotiate the rent;
- the extent to which the landlord acted in good faith;
- the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
- the extent to which the landlord required the tenant to incur unreasonable refurbishment or fit out costs.

Q: Who must prove that there has been unconscionable conduct?

A: The obligation is on the party who claims the conduct is unconscionable.

Q: What matters may the State Administrative Tribunal have regard to when determining whether a tenant has acted unconscionably towards the landlord?

A: The State Administrative Tribunal may consider similar matters that it considers for a landlord.

Q: If one or more matters exist that the State Administrative Tribunal can consider in determining whether unconscionable conduct has occurred does this mean there has been unconscionable conduct?

A: The occurrence of one or more of the listed matters does not mean that the conduct is unconscionable - the listed matters only present an increased risk of unconscionable conduct having occurred. The State Administrative Tribunal will consider all of the circumstances in considering an allegation of unconscionable conduct. Therefore, single instances of conduct may not be unconscionable but when several instances of such conduct are considered together, it may be concluded that in all the circumstances, the conduct was unconscionable.

Q: Does the Act contain any examples of circumstances which will not amount to unconscionable conduct?

A: Yes. The Act states that a person is not to be taken to engage in unconscionable conduct only because that person:

- commences legal proceedings in relation to the lease or refers a dispute or claim in relation to the lease to arbitration; or
- fails to renew the lease or enter into a new lease; or
- does not agree to having an independent valuation of current market rent carried out.

Q: What if conduct is unfair or creates a hard bargain?

A: Conduct which is merely unfair or creates a hard bargain is unlikely to be considered to be unconscionable conduct by the State Administrative Tribunal.

Q: To what leases do the unconscionable conduct provisions of the Act apply?

A: The unconscionable conduct provisions of the Act apply to all retail shop leases including those leases commenced or renewed before the commencement of the Act provided the Act would have applied to those leases had the Act been in operation at the time.

Q: Is all unconscionable conduct covered by the Act?

A: The Act only covers unconscionable conduct that occurred on or after the commencement date of the unconscionable conduct provisions. The unconscionable conduct provisions commenced on 11 May 2007.

Q: Are there any matters the State Administrative Tribunal is not to consider in determining whether unconscionable conduct has occurred?

A: The State Administrative Tribunal cannot consider any circumstances that were not reasonably foreseeable at the time of the alleged unconscionable conduct.

Q: Can the State Administrative Tribunal consider circumstances existing before the 11 May 2007?

A: Yes but not to conduct engaged in before 11 May 2007.

Q: How can a landlord or tenant who has suffered loss or damage as a result of unconscionable conduct recover that loss or damage?

A: Initially a landlord or tenant must attempt to resolve the matter through the Small Business Commissioner. If the matter is not resolved through the Small Business Commissioner the matter can proceed to the State Administrative Tribunal. The State Administrative Tribunal can then determine whether unconscionable conduct has occurred.

Q: What orders can the State Administrative Tribunal make?

A: The Tribunal can order that a party pay compensation in respect of any loss or damage suffered as a result of the unconscionable conduct, or for other appropriate remedies.

Q: When should a matter involving an allegation of unconscionable conduct be commenced?

A: The application must be lodged within six years after the alleged conduct occurred.

MISLEADING OR DECEPTIVE CONDUCT

Q: Does the Act prohibit misleading or deceptive conduct?

A: Yes. A party to a retail shop lease must not engage in misleading or deceptive conduct.

Q: What is misleading or deceptive conduct?

A: Misleading or deceptive conduct under the Act is conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease.

Q: Does the Act define misleading or deceptive conduct?

A: No, neither term is defined in the Act. However, the terms have been the subject of a great deal of interpretation by the courts. In summary, conduct will be misleading or deceptive if it causes or is capable of causing error.

Q: To whom does the prohibition apply?

A: The prohibition applies to the existing landlord and tenant and to former parties to the lease.

Q: Must the conduct have *actually* misled or deceived a party to the retail lease?

A: No, the Act also prohibits conduct which is *likely* to mislead or deceive.

Q: What does 'likely' to mislead or deceive mean?

A: It means that there is a real chance of a person being misled or deceived.

Q: Who must prove the allegation of misleading or deceptive conduct?

A: The obligation to prove the allegation is on the party who claims the conduct is misleading or deceptive.

Q: Must the person engaging in the misleading or deceptive conduct intend to mislead or deceive?

A: No, intention is irrelevant for the purposes of considering the conduct.

Q: Does the conduct of a party to the lease have to be the only cause of the other party being misled or deceived?

A: No. The conduct does not have to be the only cause of a party being misled or deceived so long as it is a substantial cause.

Q: Is 'engaging in conduct' defined in the Act?

A: No. Examples of a person engaging in conduct in a retail leasing context may include a person:

- making representations, promises or predictions;
- stating an opinion;
- providing information in a disclosure statement; and
- conducting negotiations before and during the term of the retail lease.

Q: Can silence, that is the failure to disclose an important matter, be conduct that is misleading or deceptive?

A: Yes, conduct can mean the failure to do any act. Therefore, if important information is not disclosed, or only 'half the story' is told, the conduct may be misleading or deceptive.

Q: What are some examples of 'engaging in conduct which is misleading or deceptive' in a retail leasing context?

A: Whether conduct is misleading or deceptive is a question of fact which must be decided by considering all of the circumstances. In retail leasing **possible** examples include:

- where a landlord makes representations about the proposed features of a centre such as the identity of an anchor tenant which are untrue; or
- where only some, but not all, pertinent information is disclosed so that a party only receives 'part of the story'. For example, a landlord may tell a prospective tenant the centre has a 95% occupancy but does not reveal that several larger tenants will be vacating the centre on expiry of their leases.

Q: What about representations made in relation to matters which could occur in the future?

A: Representations as to future matters may be misleading or deceptive. A possible example is where a landlord makes promises or forecasts, for example about anticipated turnover or customer flow, and these promises or forecasts are inaccurate.

Q: Can a landlord and tenant contract out of the prohibition on misleading or deceptive conduct?

A: No.

Q: Can the parties effectively 'get around' the prohibition another way? For example, a landlord and tenant may agree that neither party relied on representations by the other when entering into the retail lease.

A: Such a term will not necessarily prevent a conclusion that misleading or deceptive conduct caused the party to enter the contract. The conclusion will depend on the circumstances of the case.

Q: To what leases do the misleading or deceptive conduct provisions of the Act apply?

A: The misleading or deceptive conduct provisions of the Act apply to all retail shop leases including those leases commenced or renewed before the commencement of the Act, provided the Act would have applied to those leases had the Act been in operation at the time.

Q: Is all misleading or deceptive conduct covered by the Act?

A: The Act only covers misleading or deceptive conduct that occurred on or after the 1 January 2013.

Q: How does State Administrative Tribunal determine whether the conduct is misleading or deceptive?

A: The test as to whether conduct is misleading or deceptive or likely to mislead or deceive is an objective one determined in all the circumstances of the case and by what is reasonable. The State Administrative Tribunal may take into account all matters that it considers relevant in deciding whether misleading or deceptive conduct has occurred.

Q: How can a landlord or tenant (or former landlord or tenant) who has suffered or is likely to suffer loss or damage as a result of misleading or deceptive conduct recover that loss or damage?

A: Initially a landlord or tenant must attempt to resolve the matter through the Small Business Commissioner. If the matter is not resolved through the Small Business Commissioner the matter can proceed to the State Administrative Tribunal. The State Administrative Tribunal can then determine whether misleading or deceptive conduct has occurred.

Q: What orders can the State Administrative Tribunal make?

A: The Tribunal can order that a party, or former party, pay compensation in respect of the loss or damage or for other appropriate remedies.

Q: When should a matter involving an allegation of misleading or deceptive conduct be commenced?

A: The application must be lodged within six years after the alleged conduct occurred.

DISPUTE RESOLUTION

Q: How can a retail shop lease dispute be resolved?

A: Ideally, a landlord and tenant and/or their representatives should discuss any areas of disagreement and find a workable solution that is satisfactory to both parties. If an agreement cannot be reached, the Act contains a dispute resolution procedure.

Q. If the parties cannot reach a solution themselves, what is the next step?

A: Commence the dispute resolution procedure set down in the Act.

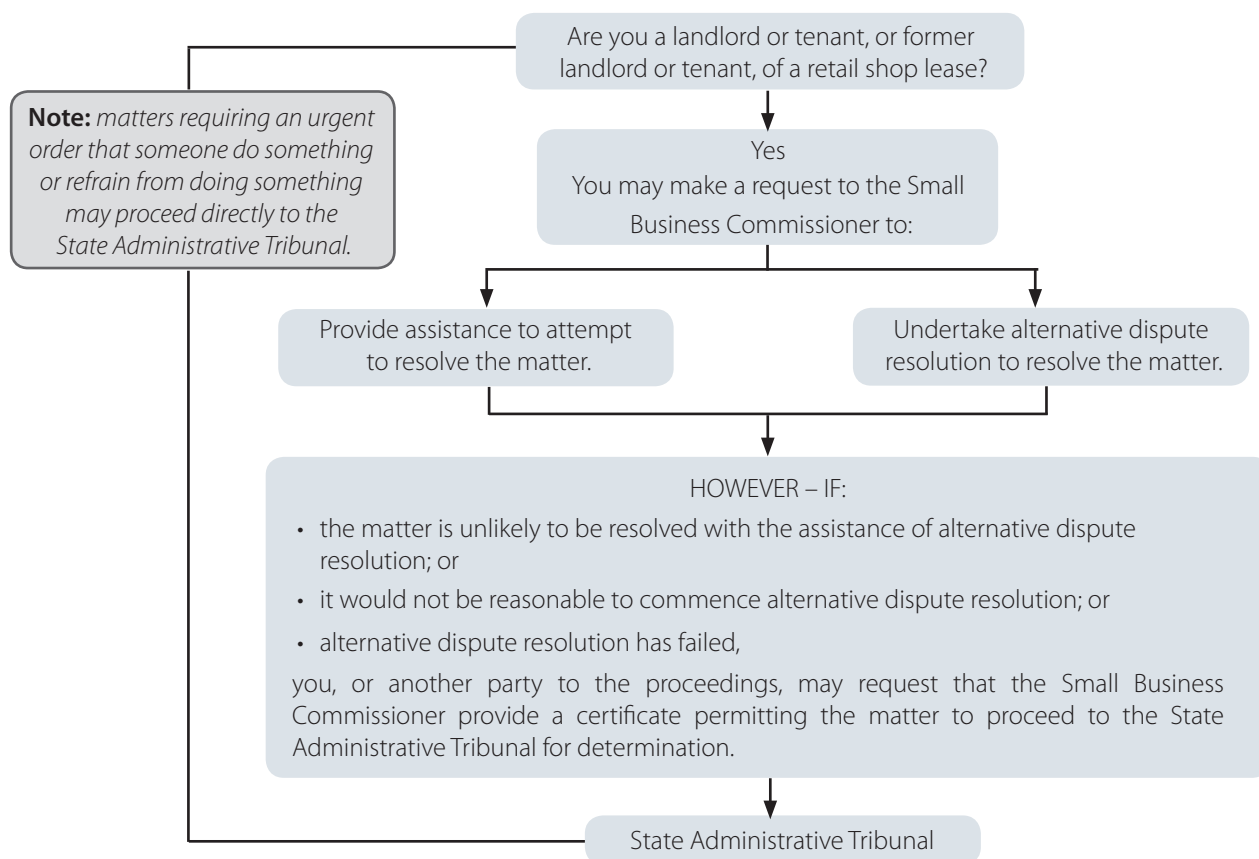
Q: Who can commence the dispute resolution procedure?

A: A party to a retail shop lease or, in some cases, a former party to a retail shop lease.

Q: In a nutshell, what is the dispute resolution procedure?

A: In most cases, a retail tenancy dispute will be considered first by the Small Business Commissioner. If the matter cannot be resolved through the Small Business Commissioner, the matter may be referred to the State Administrative Tribunal for determination. A small number of types of matters (discussed below), may proceed directly to the State Administrative Tribunal. The procedure is summarised in the diagram below.

Q: I have a dispute with my landlord/tenant. What should I do?



Note: some State Administrative Tribunal interim order applications and a very small number of mainly non-dispute type matters may also proceed directly to the State Administrative Tribunal.

DISPUTE RESOLUTION BY THE SMALL BUSINESS COMMISSIONER

Q: What are the functions of the Small Business Commissioner under the Act?

A: The Small Business Commissioner has a significant role in the resolution of retail shop lease disputes in Western Australia. The Small Business Commissioner's duties involve assisting tenants and landlords to resolve complaints and disputes related to retail tenancies. The Small Business Commissioner can:

- provide assistance to attempt to resolve the matter; or
- undertake alternative dispute resolution in respect of the matter.

Q: How can the Small Business Commissioner help parties in a retail tenancy dispute?

A: The Small Business Commissioner provides a range of services in helping the parties resolve their dispute. This includes providing information, advice and guidance together with bringing the parties together for the purpose of resolving the dispute informally, and more formal impartial alternative dispute resolution.

Q: Who can make a request for assistance to the Small Business Commissioner in relation to a dispute involving a retail shop lease?

A: Only parties to the retail shop lease (including an assignee and a subsequent purchaser of the leased premises), or in some cases a former party to a retail shop lease, can make a request for assistance.

Q: How do parties to a lease make a request to the Small Business Commissioner?

A: By contacting the Small Business Development Corporation on 13 12 49.

Q: Where can I obtain further information about making a request to the Small Business Commissioner to assist in resolving a retail tenancy dispute?

A: Further information can be obtained by contacting the Small Business Development Corporation on 13 12 49 or by visiting the Small Business Development Corporation website at smallbusiness.wa.gov.au/adr.

Q: Can the Small Business Commissioner make determinations?

A: No, only the State Administrative Tribunal and the courts can make a determination in relation to retail tenancy disputes.

Q: Can I go directly to the State Administrative Tribunal?

A: No, generally parties to a retail tenancy dispute must first seek to resolve their dispute through the Small Business Commissioner before the dispute can proceed to the State Administrative Tribunal.

Q: What matters can go directly to the State Administrative Tribunal?

A: Only a very small number of types of matters may proceed directly to the State Administrative Tribunal. These are outlined below under the heading 'State Administrative Tribunal'.

Q: What is alternative dispute resolution?

A: Alternative dispute resolution is a low cost, convenient and fast way that parties can seek to resolve a dispute without undergoing formal legal proceedings in a court or tribunal.

Q: What is the intention of alternative dispute resolution?

A: To achieve a solution that is practical, acceptable and binding for the parties involved in the dispute.

Q: What happens when a party requests that the Small Business Commissioner commence alternative dispute resolution to resolve a retail tenancy dispute?

A: When the Small Business Commissioner receives such a request, the Small Business Commissioner decides whether:

- the parties should first seek further advice or assistance (such as legal advice or an independent valuation); or
- to commence, or refuse to commence, the alternative dispute resolution proceeding for then dispute.

Q: Is any assistance given to the parties to resolve their dispute before formal alternative dispute resolution is undertaken?

A: Yes, through the Small Business Commissioner, informal assistance and guidance to resolve the dispute is provided before any formal alternative dispute resolution is undertaken.

Q: If the parties are unable to resolve their dispute through informal assistance and guidance and the Small Business Commissioner decides to commence the more formal alternative dispute resolution for a retail tenancy dispute, what is the next step?

A: The Small Business Commissioner may appoint a person with appropriate skills and experience to undertake the alternative dispute resolution. This person is called a facilitator in the Small Business Development Corporation Act 1983 however this person is commonly called a mediator.

Q: How does alternative dispute resolution work?

A: Both parties meet with the facilitator (mediator) and are given every opportunity to state their case. The facilitator (mediator) helps the parties to attempt to achieve a mutually acceptable, practical solution to the problem.

Q: If other parties are involved, can those other parties be joined?

A: Yes, parties can be joined for the purpose of an alternative dispute resolution proceeding if the Small Business Commissioner considers that the person has an interest in the matter, and that person consents to being joined.

Q: Who must pay the costs of the alternative dispute resolution proceeding?

A: The costs of an alternative dispute resolution proceeding, including the fees and expenses of the facilitator (mediator), are determined by the Small Business Commissioner. These costs are borne by the parties to the dispute. Further information can be obtained by contacting the Small Business Development Corporation on 13 12 49 or by visiting the Small Business Development Corporation website at smallbusiness.wa.gov.au/adr.

Q: How are the costs of an alternative dispute resolution proceeding determined?

A: The costs are to be paid by the parties in equal shares or, with the approval of the Small Business Commissioner, as otherwise agreed by the parties.

Q: Do parties need legal representation in the alternative dispute resolution proceeding?

A: A party may be represented by a lawyer during the proceedings but, if appropriate, the facilitator (mediator) may meet with any of the parties without the party's legal representative being present.

Q: Is an alternative dispute resolution proceeding confidential?

A: Anything lawfully said or done during the alternative dispute resolution proceeding cannot be used in a

court or tribunal or body unless the parties consent to the use of that information.

Q: What happens if alternative dispute resolution is not successful?

A: The Small Business Commissioner may, upon the request of one of the parties, issue a certificate (discussed below) and the matter can proceed to the State Administrative Tribunal for determination.

Q: Why would the Small Business Commissioner refuse to undertake an alternative dispute resolution proceeding?

A: The Small Business Commissioner may refuse to proceed with alternative dispute resolution in cases where the matter is unlikely to be resolved by alternative dispute resolution, or if it would not be reasonable to commence alternative dispute resolution in the circumstances.

Q: What happens if the Small Business Commissioner refuses to commence alternative dispute resolution?

A: The Small Business Commissioner, on the request of a party to the dispute, will issue a certificate and the matter can proceed to the State Administrative Tribunal.

Q: What is the certificate and why is it important?

A: The certificate issued by the Small Business Commissioner is a certificate that allows the matter to proceed to the State Administrative Tribunal. Without this certificate the State Administrative Tribunal will not accept an application except for a small number of types of matters. These matters are outlined below under the heading 'Dispute Resolution by the State Administrative Tribunal'.

Q: In what circumstances will the Small Business Commissioner provide the certificate?

A: The Small Business Commissioner will issue a certificate upon the request of a party to the proceedings if:

- the matter is unlikely to be resolved with the assistance of alternative dispute resolution; or
- it would not be reasonable to commence an alternative dispute resolution proceeding in respect of the matter; or
- alternative dispute resolution has failed to resolve the matter.

Q: Does the certificate have to be in a particular form?

A: Yes, the certificate must be in a form approved by the Small Business Commissioner. The certificate may include any information about the parties' conduct that the Small Business Commissioner considers relevant.

Q: Can the conduct of a party or parties before the Small Business Commissioner be taken into account by the State Administrative Tribunal?

A: Yes, the State Administrative Tribunal can take into account information about the conduct of the parties provided in the certificate issued by the Small Business Commissioner.

Q: Why is the information in the certificate issued by the Small Business Commissioner important?

A: The information in the certificate can be used by the State Administrative Tribunal when considering whether to make an order for the payment by a party of the costs of another party.

Q: Can the Small Business Commissioner intervene in any subsequent State Administrative Tribunal proceeding?

A: Yes, the Small Business Commissioner may intervene at any time in relation to a matter. However, it is anticipated this would be rare and only occur in exceptional circumstances.

DISPUTE RESOLUTION BY THE STATE ADMINISTRATIVE TRIBUNAL

Q: What is the State Administrative Tribunal?

A: The State Administrative Tribunal is an independent body that deals with a broad range of administrative, commercial and personal matters including retail shop lease disputes.

Q: In what circumstances can a retail tenancy matter proceed to the State Administrative Tribunal?

A: A matter can proceed to the State Administrative Tribunal if:

- The Small Business Commissioner has issued the required certificate; or
- The matter is one prescribed by the Regulations as a matter which can proceed directly to the State Administrative Tribunal.

Q: What types of retail tenancy matters are currently prescribed and are required to proceed directly to the State Administrative Tribunal?

A: As at 1 January 2013 the following are in broad terms the matters that can proceed directly to the State Administrative Tribunal (without the need for a certificate from the Small Business Commissioner):

1. An application that:

- the landlord complies with a request for rental information;
- operating expenses and/or referable expenses be allowed to exceed the proportion permitted under the Act;
- the renewal period for the statutory option be varied;
- the lease can be terminated earlier than the term required under the Act;
- the statutory option of renewal under the Act will not apply;
- the term of the lease required under the Act is of no effect in relation to the head lease;
- an alternative relocation provision be included in the retail shop lease;
- seeks an interim order pending final determination of an unconscionable conduct claim;
- seeks an interim order pending final determination of a misleading or deceptive conduct application;
- and
- a matter before the State Administrative Tribunal be transferred to a court.

2. Approval of a scheme of repayment, to the tenants, of the sinking fund or similar funds (for example a marketing fund) where a retail shopping centre is destroyed, damaged or ceases to operate.

3. Matters requiring an urgent order that a party to the lease do something or refrain from doing something.

Q: Can the State Administrative Tribunal determine:

- whether a lease exists or has existed; and
- whether or not a lease is or was a retail shop lease?

A: Yes, as questions arising under the lease.

Q: Who determines whether it is a question arising under the lease?

A: The State Administrative Tribunal.

Q: Who can make an application to the State Administrative Tribunal to hear a dispute under a lease?

A: Only parties to the retail shop lease (including an assignee and a subsequent purchaser of the leased premises), or in some cases a former party to a retail shop lease. The application can be initiated by either party.

Q: How do parties to a lease make an application to the State Administrative Tribunal to resolve a dispute?

A: By completing an application form and lodging it with the State Administrative Tribunal together with supporting documents and a fee which is prescribed in the *State Administrative Tribunal Regulations 2004*. (\$70 as at 1 January 2013). You must also serve a copy of the application form on the other party or parties.

Q: Where can I obtain the application form and further information about making an application to the State Administrative Tribunal?

A: Application forms and further information about making an application to the State Administrative Tribunal can be obtained from the State Administrative Tribunal by calling 9219 3111 or by visiting their website at www.sat.justice.wa.gov.au.

Q: What if a party has a problem with completing the application form?

A: The State Administrative Tribunal shall ensure that such assistance as is required for this task is given.

Q: What happens after an application is filed?

A: After an application is filed the State Administrative Tribunal will consider whether the proceedings should be listed for an initial directions hearing or be determined entirely on the documents which have been filed.

Q: What is an initial directions hearing?

A: An initial directions hearing is a hearing where the parties are brought together for the purpose of the State Administrative Tribunal considering how the matter is to best proceed. This can include referring the matter to mediation.

Q: What is the intention of the mediation?

A: To achieve an inexpensive, practical and binding solution to the problem.

Q: How does the mediation work?

A: Both parties meet with a member of the State Administrative Tribunal and are given every opportunity to state their cases. The member facilitates cross questioning and discussion, and endeavours to achieve a mutually acceptable practical solution to the problem.

Q: What happens if a mediation is successful?

A: The State Administrative Tribunal will make an order or orders reflecting the agreement reached by the parties.

Q: Must a party be legally represented at proceedings before the State Administrative Tribunal?

A: No, a party does not need to be represented by a lawyer at or before the initial directions hearing. At this stage the party can elect to not have legal representation provided the proceeding is a **minor proceeding**.

Q: What is a “minor proceeding” at the State Administrative Tribunal?

A: A minor proceeding is a proceeding in which the monetary value that can be given to the matter is no more than \$10,000.

Q: What other choices can an applicant make in a minor proceeding?

A: Additional to the no legal representation choice, the applicant can make one or more of the following choices in a **minor proceeding**:

- that there is to be no hearing (which means the State Administrative Tribunal will base its decision on the documents and there will not be a final hearing); and
- that there is to be no appeal (which means the State Administrative Tribunal’s decision will be final and cannot be appealed).

Q: What if the respondent to a proceeding in the State Administrative Tribunal fails to attend on the allotted day after receiving a notice to appear?

A: Depending on the circumstances of the non-attendance, the State Administrative Tribunal can make orders in favour of the applicant.

Q: Does the State Administrative Tribunal have real powers to hear and consider issues and make binding decisions?

A: Yes. Some of its powers include the making of orders for compensation, rewriting certain lease clauses and stopping certain parties from acting in a particular way, or requiring them to act in a certain way.

NEED MORE INFORMATION?

Visit the Small Business Development Corporation website at smallbusiness.wa.gov.au or call 13 12 49.

The Business Information Centre at the SBDC is the first place you should contact to get your business successfully under way:

- The Centre has a large selection of publications on how to buy, start or improve your business.
- Research your industry using the comprehensive range of reference material.

If you cannot visit the Centre, a mail and credit card order service is available. For more information or a copy of the Publications Catalogue call 13 12 49.

Alternatively, visit the online bookshop at the SBDC website.

WHICH LICENCE?

The Business Information Centre is a one stop source of information on business licence requirements.

Tell us the nature of your business and we will provide you with a complete package of licence information you will require to operate your business in Western Australia.

Four easy ways to access the Centre's licence information:

- Tel: 13 12 49
- Fax: 6552 3399. Provide your name, address, contact number and the type of business you intend to operate;
- Call into the Centre at Level 2, 140 William Street, Perth and collect your information package personally; or
- Visit the website at licence.smallbusiness.wa.gov.au.

INFORMATION AND GUIDANCE ON LEASING RETAIL PREMISES

The SBDC has a specialist Commercial Tenancy service that offers tenants and landlords information and guidance on the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

There is no charge for the service which includes all aspects of lease negotiations and operations.

Relevant leasing publications are available for purchase from the Business Information Centre:

- *How to negotiate your way to a better retail lease*
- *Leasing business premises: a commercial and practical guide*
- *Common questions about the Commercial Tenancy Act (for leases entered into before 1 July 1999)*
- *Common questions about the Commercial Tenancy Act (for leases entered into on or after 1 July 1999 but before 1 January 2013)*
- *Common questions about the Commercial Tenancy Act (for leases entered into on or after 1 January 2013)*

For more information call the SBDC on 13 12 49.

SMALL BUSINESS COMMISSIONER AND RETAIL TENANCY DISPUTE RESOLUTION

Information about making a request to the Small Business Commissioner to assist in resolving a retail tenancy dispute can be obtained by contacting the Small Business Development Corporation on 13 12 49 or by visiting the Small Business Development Corporation website at smallbusiness.wa.gov.au/adr.



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