

CLAYTON UTZ

## Retail Tenancies Comparative Analysis 2012



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### Introduction

For a retail landlord or retail tenant, retail tenancy legislation can be a minefield, a trap for young players and a downright headache. The fact that each State has its own Act (each inconsistent with the other, and each inescapable), makes property managers long for a career move.

We have tried to make our job and yours easier by preparing a user friendly analysis of retail tenancy legislation.

The analysis compares the main provisions of the New South Wales legislation against legislation in Victoria, Queensland, Western Australia, South Australia, the ACT, Tasmania and the Northern Territory and is an update of our popular Retail Tenancies Comparative Analysis 2010.

The analysis incorporates legislative amendments up to 9 May 2012.

Clayton Utz has extensive expertise in acting for landlords and tenants on retail tenancy matters and on commercial property acquisitions, joint ventures sales and development matters generally.

If we can assist you in any aspect of your retail business, or any other business, please refer to the Contacts page for the lawyers in your State.



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*Clayton Utz acknowledges the contribution of Claire Shelvey, Senior Associate in the Sydney Real Estate Group in co-ordinating the 2012 update of this document.*

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**Disclaimer:** This analysis is produced by Clayton Utz, Lawyers. It is intended to provide general information in summary form on retail leases, current as at 9 May 2012. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. The persons listed above may not be admitted in all states.

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NSW Retail Leases Act 1994	QUEENSLAND Retail Shop Leases Act 1994	VICTORIA Retail Leases Act 2003	SOUTH AUSTRALIA Retail and Commercial Leases Act 1995	WESTERN AUSTRALIA Commercial Tenancy (Retail Shops) Agreements Act 1985	ACT Leases (Commercial and Retail) Act 2001	TAS Code of Practice for Retail Tenancies	NORTHERN TERRITORY Business Tenancies (Fair Dealings) Act 2003
<b>DEFINITION OF "RETAIL SHOP" AND EXCLUSION OF CERTAIN RETAIL SHOPS</b>							
<p>SS.3 and 5 refer. "Retail shop" means premises that are used wholly or predominantly for the carrying on of 1 or more businesses prescribed in the Act (whether or not in a "RSC")<sup>1</sup>, or premises proposed to be used for the carrying on of any business in a RSC.</p>	<p>S.5 refers. "Retail shop" means premises that are situated in a RSC or used wholly or predominately for the carrying on of 1 or more retail businesses specified in the Regulations.</p> <p>S.8 refers. All shops in a RSC are retail shops. A RSC is a cluster of premises having all of the following attributes:</p> <ul style="list-style-type: none"> <li>• 5 or more premises carrying on retail businesses as specified;</li> <li>• all premises owned or leased by the same landlord or within one community titles scheme;</li> <li>• located in the same building, adjoining buildings or buildings separated only by common areas or a road; and</li> <li>• the cluster of premises is promoted or generally regarded as constituting a shopping centre, shopping mall, shopping court or shopping arcade.</li> </ul>	<p>S.4 refers. "Retail premises" means premises, not including any area intended for use as a residence, that under the terms of the lease are used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services.</p>	<p>S.3 refers. A "retail shop" is business premises (being premises at which goods are sold to the public by retail or services supplied to the public or to which the public is invited to negotiate for the supply of services) or premises classified by regulation as premises to which the Act applies.</p>	<p>S.3 refers and following proclamation of the amending Act "retail shop" will mean premises that are either:</p> <ul style="list-style-type: none"> <li>• situated in a RSC and are used wholly or predominantly for the carrying on of any business (whether or not retail); or</li> <li>• <b>not</b> situated in a RSC but are used wholly or predominately for the carrying on of a "retail business" (being a business that wholly or predominantly involves the sale of goods by retail or a business specified in the Regulations).</li> </ul> <p>A RSC means a cluster of premises:</p> <ul style="list-style-type: none"> <li>• 5 or more of which are used for the carrying on of a "retail business"; and</li> <li>• all have or upon being leased would have a common head lessor; or</li> <li>• comprise lots on a single strata plan under the Strata Titles Act,</li> </ul>	<p>S.7 refers. The Act applies to "retail premises" which are premises where:</p> <ul style="list-style-type: none"> <li>• the permitted use under the lease is for "retail business" (being business involving the sale or hire of goods or the supply of services by retail); or</li> <li>• if there is nothing in the lease about the use, a "retail business" may be carried on under the lease for land that includes the premises, other than "large excluded premises" (being premises of more than 1,000 sqm which are leased to a listed public company or a subsidiary of a listed public company).</li> </ul> <p>The Act also applies to:</p> <ul style="list-style-type: none"> <li>• premises located in the retail area of a shopping centre, other than "large excluded premises"; and</li> <li>• "small commercial premises" (being commercial premises with a lettable area of no more than 300 sqm); and</li> <li>• other premises</li> </ul>	<p>S.2 refers. "Retail premises" means premises that are used wholly or predominantly for 1 or more of the businesses listed in the Code (Appendix C) or for any business in a RSC.</p> <p><u>Note:</u> Code refers to "shopping centre", as opposed to "retail shopping centre", but the definition is essentially the same as "retail shopping centre" in the NSW Act.</p> <p>The Code applies to the following in relation to retail premises with a lettable area of not more than 1,000 square metres:</p> <ul style="list-style-type: none"> <li>• a lease of, or an agreement to lease, such premises entered into on or after the commencement of the Code, regardless of where the lease or agreement to lease was entered into and despite the fact that the lease or agreement to lease purports to be governed by the law of a jurisdiction other than Tasmania;</li> <li>• a lease of, or an</li> </ul>	<p>S.5(1) refers. "Retail shop" means premises which are used wholly or predominantly for:</p> <ul style="list-style-type: none"> <li>• the sale or hire of goods by retail or the retail provision of services (whether of not in a RSC);</li> <li>• the carrying on of business in a RSC; or</li> <li>• the carrying on of business of a class or description that is prescribed by the Regulations.</li> </ul> <p>A RSC is one which:</p> <ul style="list-style-type: none"> <li>• contains a cluster of premises, at least 5 of which are used wholly for the sale or hire of goods by retail or the retail provision of services and which are either owned by the same person or if leased would have the same landlord, or which all comprise lots within a single units plan under the Unit Titles Act;</li> <li>• has premises which are either in 1 building or 2 or more buildings that are adjoining or separated by common</li> </ul>

<sup>1</sup> For definitions, please refer to the last page of this Analysis.

NSW Retail Leases Act 1994	QUEENSLAND Retail Shop Leases Act 1994	VICTORIA Retail Leases Act 2003	SOUTH AUSTRALIA Retail and Commercial Leases Act 1995	WESTERN AUSTRALIA Commercial Tenancy (Retail Shops) Agreements Act 1985	ACT Leases (Commercial and Retail) Act 2001	TAS Code of Practice for Retail Tenancies	NORTHERN TERRITORY Business Tenancies (Fair Dealings) Act 2003
				<p>1985 (WA),</p> <p>but if the premises are in a building with 2 or more floor levels then the RSC includes only those levels of the building where a "retail business" is situated.</p> <p>The transitional provisions in the amending Act, however, exclude from the operation of the Act those existing leases (i.e. entered into before the Act was proclaimed or pursuant to an option to renew originally contained in such a lease) which previously were not caught by the Act before the amendments.</p>	(specified in S.12) including child care centres, premises (other than residential premises) let to unincorporated charitable bodies or to incorporated associations and premises prescribed under the Regulations.	<p>agreement to lease, such premises that was entered into before the commencement of the Code, if:</p> <ul style="list-style-type: none"> <li>- the lease or agreement to lease is varied after that commencement; and</li> <li>- the variation was not provided for by the original lease or agreement to lease;</li> </ul> <ul style="list-style-type: none"> <li>• a new lease of such premises resulting from the exercise of an option contained in a lease that was entered into before the commencement of the Code, if: <ul style="list-style-type: none"> <li>- the number of times remaining for the option to be exercised is not specified in the lease or does not decrease when the option is exercised; or</li> <li>- the new lease contains a variation that was not provided for by the original lease;</li> </ul> </li> <li>• a sublease of such premises entered into on or after the commencement of the Code.</li> </ul>	<p>areas or other areas owned by the owner of the retail shops; and</p> <ul style="list-style-type: none"> <li>• is promoted or generally regarded as constituting a shopping centre, shopping court, shopping mall or shopping arcade.</li> </ul>
S.5 refers. The Act does not apply to shops that have a "lettable area" of 1,000 sqm. or more, to businesses run by or on behalf of the landlord, to premises where the principal business	S.13 and Schedule refer. The Act does not apply to premises where the floor area is in excess of 1,000 sqm and the tenant is a listed company or subsidiary of a listed	S.4 refers. The Act does not apply to premises: <ul style="list-style-type: none"> <li>• where occupancy costs are more than \$1 million per annum;</li> <li>• used wholly or predominately for the</li> </ul>	S.4 refers. The Act does not apply where rent exceeds \$400,000 per annum (or greater amount if prescribed by regulation), the lease is for a term of 1 month or less or where the	S.3 refers and following proclamation of the amending Act the Act will not apply to a retail shop if either: <ul style="list-style-type: none"> <li>• the lettable area of the retail shop is in excess</li> </ul>	S.12 refers. The Act does not apply to a lease if: <ul style="list-style-type: none"> <li>• the premises are prescribed under the Regulations;</li> <li>• the lease is prescribed under the regulations;</li> </ul>	S.2 refers. The Code does not apply to retail premises having a lettable area of more than 1,000 sqm. "Lettable area" is defined to mean an area measured in square metres and set out in	SS.6 and 7 refer. The Act does not apply to: <ul style="list-style-type: none"> <li>• shops with a lettable area of 1,000 sqm or more;</li> <li>• shops used predominantly for the</li> </ul>



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<p>carried on is that of a cinema, bowling alley or skating rink or to any premises in an office tower that forms part of a RSC.</p>	<p>company.</p> <p>Pursuant to S.10 of the Regulations, a lease is not a "retail shop lease" if the floor area is in excess of 10,000 sqm.</p> <p>The Act will not apply to retail shops within the South Bank corporation area if the lease is a perpetual lease or another lease for a term (including renewal options) of at least 100 years entered into or granted by the South Bank Corporation.</p> <p>Businesses run in a theme or amusement park or at a flea market including an arts and crafts market or a temporary retail store at an agricultural or trade show or a carnival, festival or cultural event or other type of premises prescribed by regulation are also excluded.</p> <p>The Act also excludes leases of areas used for information, entertainment, community or leisure facilities, telecommunications equipment, displaying advertisements, storage or parking in what would otherwise be the common areas of the centre.</p> <p>S. 17 refers. The Act does not apply to service station franchises caught by the Trade Practices (Industry Codes - Oil Code) Regulations 2006 (Cth).</p>	<p>carrying on of a business by a tenant on behalf of the landlord as the landlord's employee or agent;</p> <ul style="list-style-type: none"> <li>where the tenant is a listed corporation (as defined in S.9 of the Corporations Act) or a subsidiary thereof;</li> <li>where the tenant is a body corporate whose securities are listed on a stock exchange outside Australia, that is a member of the World Federation of Exchanges or a subsidiary;</li> <li>located above the first 3 storeys (excluding the basement) of a building (other than a retail shopping centre) where the tenant is providing retail services (not selling/hiring goods);</li> <li>which are barristers chambers;</li> <li>leased under a long term lease (generally where the term is at least 15 years) where the tenant must, carry out or pay for the cost of carrying out substantial work on the premises which it is not entitled to remove at or at any time after the end of the lease;</li> <li>that are located entirely within the Melbourne Markets being "market land" as defined by the Melbourne Market Authority Act 1977;</li> <li>where the lease is for a</li> </ul>	<p>occupation rights arise under a sale or purchase of property, a mortgage, or a defined scheme.</p> <p>Tenants that are public companies (or subsidiaries of public companies), authorised deposit taking institutions, insurance companies, local councils and the Crown are excluded.</p> <p>The Regulations exclude some classes of retail shops from the Act's application.</p>	<ul style="list-style-type: none"> <li>of 1,000 sqm; or</li> <li>the tenant is either a listed corporation within the meaning of the Corporations Act that would not be eligible to be incorporated in Western Australia as a proprietary company or is the subsidiary of such a corporation; or</li> <li>the tenant is a body corporate whose securities are listed on a stock exchange outside Australia and the external territories, that is a member of the World Federation of Exchanges, or is the subsidiary of such a body corporate; or</li> <li>the lease or the tenant or the premises is a kind prescribed by the regulations as being exempt from the operation of the Act.</li> </ul> <p>S.4 also refers following proclamation of the amending Act. It recognises the ability to make regulations for the purpose of making the above exemptions.</p> <p>Due to the definition of "lease" in S.3 the Act continues not to apply to licences of part of the common area of a "RSC" as long as the continued use of the licensed area as part the common area is not thereby precluded.</p>	<p>or</p> <ul style="list-style-type: none"> <li>the lease is for less than 6 months, unless it is a "continuous occupation lease".</li> </ul> <p>Under S.10, a continuous occupation lease is a lease for premises for a term of less than 6 months if:</p> <ul style="list-style-type: none"> <li>the tenant was in occupation of premises with the owner's consent when the lease was entered into; and</li> <li>the tenant has been in continuous occupation of the premises with the owner's consent for at least 6 months.</li> </ul>	<p>a lease as the area for which a tenant pays rent.</p> <p>The Code also does not apply to retail premises:</p> <ul style="list-style-type: none"> <li>used wholly or predominantly for a business carried out by a tenant on behalf of the landlord; or</li> <li>within premises where the principal business carried on is that of a cinema, bowling alley, skating rink, indoor cricket centre, basketball stadium, or netball centre, and the business in the retail premises is carried on by the person who operates the principal business (S. 2(4)); or</li> </ul> <p><u>Note:</u> The Code refers to "property owner" as opposed to "landlord" or "lessor". "Property owner" is defined as "a person who grants a right of occupancy of premises under a lease".</p> <ul style="list-style-type: none"> <li>where the lease or agreement to lease was entered into before the commencement of the Code (S.2(3)(a)); or</li> <li>where a lease was entered into on or after the commencement of the Code, in accordance with an agreement to lease, however the agreement to lease was entered into before the commencement of the Code (S.2(3)(c)); or</li> <li>a new lease resulting</li> </ul>	<p>carrying on of a business by the tenant on behalf of the landlord;</p> <ul style="list-style-type: none"> <li>shops within premises where the principal business is the operation of a cinema or bowling alley, and the shop is operated by the person who operates the cinema or bowling alley;</li> <li>shops leased to listed corporations, subsidiaries of listed corporations, a body corporate or subsidiaries of a body corporate.</li> </ul> <p>The Regulations also exclude specific classes of shops.</p> <p>Also, the Act does not apply to:</p> <ul style="list-style-type: none"> <li>leases for terms of less than 6 months or more than 25 years; or</li> <li>leases entered into before the commencement of S.7 or under an option granted or agreement made before the commencement of S.7.</li> </ul> <p>The Regulations also exclude specific classes and description of leases.</p>

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		<p>term of less than 1 year and the tenant is not in possession for 1 year or more (S.12 refers);</p> <ul style="list-style-type: none"> <li>• which are local Council premises that are leased for certain community purposes; or</li> <li>• the tenant of which is a body corporate whose securities are listed on the New Zealand Stock Exchange Limited or a subsidiary.</li> </ul>				<p>from the exercise of an option contained in a lease entered into before the commencement of this Code, if:</p> <ul style="list-style-type: none"> <li>- the number of times remaining for the option to be exercised is specified in the lease or decreases when the option is exercised; or</li> <li>- the new lease contains no variation other than a variation that was provided for by the original lease (S.2(3)(d)).</li> </ul>	
<b>APPLICATION OF ACT TO SHORT-TERM LEASES</b>							
S.6A refers. The Act applies to short-term leases where the tenant has been in possession or is entitled to be in possession of a retail shop without interruption for more than 1 year.	S.13(9) refers. Only the trading hours provisions of the Act (SS.51 to 53) apply to leases where the total term is less than 6 months (including options). It should also be noted that SS.43, 43A and 44 (compensation provisions) do not apply to periodic tenancies or tenancies at will, except where the tenant is holding over under a prior lease with the landlord's consent.	No distinction made regarding short-term leases.	S.20B and S.20C refer. The minimum 5 year term does not apply to a short term lease (less than 6 months). Division 3 of the Act - which only applies to leases in a retail shopping centre - does not apply to short term leases.	<p>S.3 refers and the Act applies to all "retail shop leases" whether for a term or by way of periodic tenancy or a tenancy at will and whether or not in writing.</p> <p>As a result even a monthly lease attracts the Act and will continue to do so.</p> <p>However, under the amending Act the statutory option for a guaranteed 5 year term in S.13 will not apply to short term leases where the tenant has been continuously in possession of the premises for an aggregate term of less than 6 months. The Act will still apply to such leases in</p>	No distinction made regarding short-term leases.	<p>No mention of the "short term leases" in the Code.</p> <p>The Code applies to all "leases" as defined (in S.1) being:</p> <ul style="list-style-type: none"> <li>• any agreement for occupation of retail premises, whether for a term, periodically or at will; and</li> <li>• a licence/other agreement to use the common area of a shopping centre for more than 6 months.</li> </ul>	No distinction made regarding short-term leases.

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<b>THIS ACT OVERRIDES LEASES</b>				other respects.			
S.7 refers. The Act operates despite the provisions of a lease. The terms of the Act cannot be avoided by agreement between the parties, whether the agreement is contained within the lease or any other arrangement.	SS.18, 19 and 20 refer. Any duty or entitlement conferred by the Act is included in the lease. Any provision in the lease purporting to exclude the application of the Act is void. The Act prevails over inconsistent provisions in leases.	S.94 refers. The Act overrides leases.	S.5 refers. The Act overrides leases, and to the extent that the lease is inconsistent with the Act, the provision within the lease is void.	S.15 and S.3(2) refer. The Act overrides the provisions in retail shop leases, and to the extent that the lease is inconsistent with the Act, the provision within the retail shop lease is void. This applies whether the agreement is contained within the lease itself or in any other arrangement. The definition of "lease" in the Act is very wide and includes any verbal or written lease, licence or other agreement providing for occupation of premises in WA.	SS.19 and 20 refer. A provision of a lease which is inconsistent with the Act is void to the extent of the inconsistency. Provisions required to be included in a lease are deemed to be included.	S.2(6) refers. The Code prevails over inconsistent provisions of a lease or an agreement for lease.	S.9 refers. The Act operates despite the provisions of a retail shop lease. To the extent that the lease is inconsistent with the Act, the provisions of the lease are void.
<b>DEEMED COMMENCEMENT DATE OF LEASE</b>							
S.8 refers. A retail shop lease is deemed to commence when a person enters into possession as tenant or begins to pay rent as tenant (whichever happens first). The lease is considered to be entered into as soon as both parties have signed it.	S.11 refers. The lease is entered into on the earlier of the date on which the lease becomes binding on the parties and the date on which the tenant enters into possession.	S.7 refers. A retail premises lease is entered into when either: <ul style="list-style-type: none"> <li>under the lease, the tenant enters into possession of the premises with the consent of the landlord or begins to pay rent; or</li> <li>the lease has been signed by all parties, whichever occurs first.</li> </ul>	S.6 refers. Similar to NSW.	There is no deemed commencement date of the lease.  However, there is a deemed entry into the lease or commencement of the lease. S.3 refers. A retail shop lease is entered into when: <ul style="list-style-type: none"> <li>under the retail shop lease the tenant enters into possession;</li> <li>or the tenant commences paying rent; or</li> <li>if the retail shop lease is in writing, both parties sign the lease; whichever occurs first.</li> </ul> As noted above the definition of "lease" in the	S.5 refers. The Lease is entered into on earlier of: <ul style="list-style-type: none"> <li>execution of the lease by the parties; or</li> <li>the tenant entering into possession of the premises.</li> </ul>	S.17 refers. Rent and outgoings are to commence from the date of handing over possession with all finishes provided by the landlord in accordance with the lease, unless otherwise agreed.	S.10 refers. A retail shop lease is entered into when: <ul style="list-style-type: none"> <li>both parties sign the lease instrument;</li> <li>the tenant enters into possession; or</li> <li>the tenant commences to pay rent, whichever occurs first.</li> </ul>

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				Act is very wide.  This is relevant, for example, for ascertaining whether a DS has been duly given under S.6 before the lease was entered into (even if the commencement date is some time in the future).			
<b>COPY OF LEASE/DOCUMENTS AVAILABLE AT NEGOTIATION STAGE</b>							
<p>S.9 refers. Landlords are prohibited from offering to enter into a retail shop lease, inviting an offer to do the same or indicating by advertisement that a retail shop is for lease unless they hold a copy of the proposed retail shop lease in written form (but not necessarily including particulars of the tenant, the rent or the term of the lease) and if the Regulations provide, a copy of a retail tenancy guide prescribed by or identified in the regulations for the purpose of making the lease available for inspection by a prospective tenant as soon as the person enters into negotiations.</p> <p>The copy of the retail tenancy guide is to be either an officially printed guide or a version from a website of a government department or authority or from a website identified in the Regulations.</p>	<p>S.22 refers. A landlord is required to provide the tenant with a draft lease at least 7 days before the lease becomes binding or the tenant enters into possession.</p>	<p>S.15 refers. Where a landlord or its agent offers to enter into a retail premises lease, or advertises by any means that retail premises are for lease, he must as soon as he enters into negotiations give the proposed tenant a copy of the proposed lease in writing (but not necessarily including particulars of the tenant, the rent or the term of the lease) and a copy of the information brochure published by the Small Business Commissioner. Penalty: 50 penalty units. However, the above requirements do not apply to a renewal of lease. Note: The landlord must notify the Small Business Commissioner of lease details within 14 days of the lease being signed by all parties or renewed (S. 25 refers). Penalty: 10 penalty units.</p>	<p>S.11 refers. Similar to NSW, but no obligation regarding retail tenancy guide.</p>	<p>S.6 refers. The landlord must give the tenant (as part of the prescribed requirements for a DS as detailed below) a copy of the landlord's form of "lease" document at least 7 days before the "lease" is entered into.</p> <p>As noted above the definition of "lease" in the Act is very broad and would include an offer to lease.</p>	<p>S.28 refers. The landlord must give the tenant a copy of the proposed lease as early as practicable in negotiations for the lease.</p>	<p>S.5(2) refers. The landlord must provide the tenant with a copy of the proposed lease and Code as early as practicable in the negotiations.</p>	<p>S.17 refers. The landlord (or anyone acting on behalf of the landlord) cannot offer to enter into a lease or invite an offer to enter into a lease from a tenant, unless he makes a copy of the proposed lease available to the prospective tenant. Penalty: 100 penalty units (natural person) and 500 penalty units (body corporate).</p>

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<b>COMPENSATION FOR PRE-LEASE MISREPRESENTATIONS</b>							
S.10 refers. An injured party may claim reasonable compensation for damage attributable to a false or misleading representation made by the other party with the knowledge that it was false or misleading. This includes a representation made by the landlord in its DS or a representation made by the tenant in its DS that the tenant has sought independent advice.	S.43(2) refers. Similar to NSW except that it extends to: <ul style="list-style-type: none"> <li>misleading statements by or on behalf of the landlord. There is no requirement that misrepresentation (by or on behalf of the landlord) was made with the knowledge that it was false or misleading; and</li> <li>the tenant is entitled to compensation if the shop is not available for leasing on the date specified in the DS due to the default of the landlord or anyone acting under the landlord's authority.</li> </ul> S.43A refers. Compensation is also payable by a party for a false or misleading statement in a DS. This right to compensation is not limited to landlords. It extends to statements by tenants or assignees.	S.17 refers. See below.	S.12 refers. If a DS contains materially false or misleading information at the time it is given, the tenant may apply to the Magistrates Court for appropriate orders, including orders to void or vary the lease and/or the payment of compensation.	S.6(1)(b) refers. Where a DS either: <ul style="list-style-type: none"> <li>has not been given by the landlord in accordance with the Act; or</li> <li>has been given but contains incomplete, false or misleading information,</li> </ul> the tenant may (in addition to any other rights it may have, including termination as referred to below) apply in writing to the WA SAT for an order that the landlord must pay compensation in respect of pecuniary loss attributable to failure to supply a DS or the supply of a DS with incomplete, false or misleading information. <p>There is no exoneration of the landlord from paying compensation based on the reason for the incorrect or misleading information and strict liability will remain on the landlord in that regard. This will remain the case under the amending Act once proclaimed. Compare with termination below.</p>	S.36 refers. A party must not make representations to another party to the lease during negotiations which it knows or should reasonably know are false or misleading in a material particular. <p>S.37 refers. If this happens and:</p> <ul style="list-style-type: none"> <li>the lease is entered into because of the negotiations; and</li> <li>the injured party suffers damage because of the representation,</li> </ul> the representor is liable to pay reasonable compensation to the injured party.	S.5(1) refers. A person must not make a representation to another party that the person knows is not accurate, truthful and without omission of any material matter at the time it is made.	S.18 refers. Any party to a retail shop lease is liable to pay the other party reasonable compensation for damage suffered by them attributable to their entry into the lease as a consequence of a false or misleading statement or false or misleading representation, knowingly made. This includes a representation made by the landlord in its DS or a representation made by the tenant in its DS that the tenant has sought independent advice.
<b>DISCLOSURE STATEMENT TO BE PROVIDED BY LANDLORD</b>							
S.11 refers. Landlord must provide the tenant with a DS at least 7 days before a lease is entered into. The	S.22 refers. The landlord is to provide the tenant with a draft lease and DS containing particulars	S.17 refers. The DS must be provided at least 7 days before the parties enter into the lease.	S.12 refers. The tenant must be given a DS in the form required by the Act and the Regulations before	S.6 refers. The landlord must provide the tenant with a duly completed DS, signed by both the landlord	S.30 refers. The landlord must give the tenant a DS: <ul style="list-style-type: none"> <li>at least 14 days before the lease is entered</li> </ul>	S.6 refers. The landlord must provide tenant a DS at least 7 days before the earliest event of the tenant	S. 19 refers. The landlord must provide the tenant with a DS at least 7 days before the lease is entered

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<p>details required to be included in the DS (to the extent that they are relevant to the lease concerned) are set out in the prescribed form. The DS must also attach to form of DS to be provided by the tenant as set out in the form prescribed for the purposes of S. 11A. If the tenant is not given a DS as required by the Act, or if the DS provided is incomplete or contains materially false or misleading information, the tenant is entitled to terminate the lease by notice in writing within 6 months of entering into the lease. However, the tenant is not entitled to terminate where the landlord has acted honestly and reasonably and ought reasonably to be excused and the tenant is in substantially as good a position as he would have been if the failure had not occurred. There is also a penalty imposed on the landlord of up to 50 penalty units if the tenant is not given a DS as required by the Act.</p>	<p>prescribed by regulation at least 7 days before the earlier of the date the lease becomes binding and the tenant takes possession.</p> <p>If the landlord fails to comply, or if the landlord's DS is incomplete or contains information which is materially false or misleading, the tenant is entitled to terminate within 6 months of the earlier of the date the lease becomes binding and the date the tenant enters into possession.</p> <p>As with NSW, the landlord is also liable to pay reasonable compensation in those circumstances decided by way of dispute resolution process whether or not the lease is terminated (defence).</p> <p>The prescribed particulars for the DS in Qld are found in S.3 of the Regulations.</p> <p>The landlord is taken to have given the DS to the tenant within the disclosure period if the tenant is a major tenant (being tenants of 5 or more retail shops in Australia) and the tenant gives the landlord certain notices. The landlord must still give the DS however it only needs to be given before the tenant enters into the lease not 7 days before.</p>	<p>The DS is to be in the form prescribed by the Regulations (but the layout of the DS need not be the same as the prescribed DS). A sub-landlord who has been given a DS concerning a head lease is only required to give a sub-tenant a copy of that DS and details of changes from that DS.</p> <p>If the tenant is not given the DS before entering into the lease, the tenant may give the landlord, no earlier than 7 days and no later than 90 days after entering into the lease, a notice that he has not received the DS. If such notice is given, the tenant may withhold payment of rent until the day on which the landlord gives the tenant the DS and the tenant may give the landlord a written notice of termination at any time within 7 days of the landlord giving the DS to the tenant.</p> <p>If the premises are not available for handover to the tenant on the date specified in the DS, the tenant is not liable to pay rent attributable to a period before the date on which the premises are available for handover.</p> <p>If the DS is misleading, false or materially incomplete or the tenant is not given a copy of the proposed lease at least 7 days before entering into the lease, the tenant may</p>	<p>a retail shop lease is entered into or renewed.</p> <p>If DS not provided, or at the time it is given is materially false or misleading, the Magistrates Court may make orders to avoid or vary the lease, or require the landlord to refund money or pay compensation.</p>	<p>and tenant, at least 7 days before the "lease" is entered into.</p> <p>The details required to be included in the DS are set out in the prescribed form and must contain a statement notifying the tenant to seek independent legal advice. The DS must attach a copy of the "lease" (as broadly defined). The DS includes a place for the tenant to make disclosure to the landlord of its requirements and representations made to the tenant.</p> <p>If the tenant is not given a DS as required by the Act, or if the DS provided is incomplete or contains materially false or misleading information, in addition to any other rights the tenant may have (including compensation, as referred to above) the tenant is entitled to terminate the lease by notice in writing within 60 days of "entering into the lease". (Once the amending Act is proclaimed this period of 60 days will become 6 months in relation to new leases but not existing leases).</p> <p>Further, once the amending Act is proclaimed the position in relation to new leases (but not existing leases) will be the same as in NSW by inserting circumstances where the</p>	<p>into; or</p> <ul style="list-style-type: none"> <li>if the lease contains an option to extend and the tenant, not more than 3 months before the tenant may exercise the option, requests the landlord to give a DS, within 14 days of that request.</li> </ul>	<p>signing a lease, or signing an agreement to lease or entering into occupation of the premises, or paying rent.</p> <p>The DS is to be in the form of Appendix B to the Code and is to be signed both on behalf of the landlord and the tenant.</p> <p>S.7 refers. The Tenant may terminate the lease within 3 months of its commencement if the landlord fails to notify the tenant in writing of any material changes to the information contained in the DS if the change occurs after the DS is signed but before the earlier of the date on which the tenant signs the lease or enters into occupation of the premises. However, the landlord may contest the tenant's termination on the grounds that the landlord has acted honestly and reasonably and ought fairly to be excused for the contravention and that the tenant is substantially in as good a position as he would have been if there had been no contravention.</p>	<p>into. The details required to be included in the DS are prescribed in the regulations. Penalty: 100 penalty units (natural person) and 500 penalty units (body corporate).</p> <p>If a lease is entered into by way of a renewal, a written statement that updates the provisions of an earlier DS given to the tenant is, in conjunction with the DS, given at the earlier time the Landlord's update is given.</p> <p>S. 20 refers. If the landlord fails to provide the DS or the DS is incomplete or contains information which is materially false or misleading, the tenant may terminate the lease within 6 months after the lease was entered into.</p> <p>However, the tenant cannot terminate the lease if the landlord acted honestly and reasonably and ought reasonably to be excused from having given an incomplete DS or information that is materially false or misleading, and the tenant is in substantially as good a position as the tenant would have been if the DS had been complete or the information had not been materially false or misleading.</p>

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		<p>terminate the lease at any time within 28 days of the tenant being given the DS, the tenant being given a copy of the lease or the lease being entered into, whichever happens last.</p> <p>The tenant may not terminate the lease if the landlord has acted honestly and reasonably and ought fairly to be excused for the contravention and the tenant is substantially in as good a position as the tenant would have been in if there had been no contravention.</p> <p>If a tenant has been given a DS before entering into an agreement for a retail premises lease, the landlord is not required to give a further DS before subsequently entering into a retail premises lease if that lease is substantially in accordance with the earlier agreement for lease.</p>		<p>tenant will <b>not</b> have termination rights on a breach of the DS requirements by the landlord.</p> <p>A DS does not need to be given by the landlord:</p> <ul style="list-style-type: none"> <li>on a renewal of a retail shop lease under an option to renew contained in the lease; or</li> <li>on an assignment of the retail shop lease.</li> </ul>			
<b>DS TO BE PROVIDED BY TENANT</b>							
S.11A refers. The tenant must provide the landlord with a DS no later than 7 days after receiving the landlord's DS. The details required to be included in the DS (to the extent that they are relevant to the lease concerned) are set out in the prescribed form. If the lease is a renewal of an existing lease, a written statement ("tenant's disclosure update") which updates the provisions of the earlier tenant's DS	<p>SS.22A, B, C, D and E refer.</p> <p>Section 22A - The tenant must provide the landlord with a DS prior to entering a retail shop lease.</p> <p>S.22B - An assignor of a lease must give an assignee a DS at least 7 days before asking the landlord to consent to the assignment. The assignee must give a DS to the assignor before the landlord is asked to</p>	No mention in the Act.	No mention in the Act. However S.12 refers. The tenant should sign an acknowledgement of receipt of the landlord's DS before signing the lease.	<p>No express mention in the Act.</p> <p>However, the tenant's disclosure to the landlord forms part of the prescribed DS referred to in S.6(4) of the Act. The details required to be disclosed by the tenant are set out in the prescribed form. S.6(1) requires the tenant to sign the DS as part of the DS having been given in accordance with the Act.</p>	<p>S.32 refers. The tenant must note on the DS the date it was received, sign the DS and return it to the landlord on the earlier of:</p> <ul style="list-style-type: none"> <li>the time the tenant returns the signed copies of the lease to the landlord; and</li> <li>3 months after the lease is entered into.</li> </ul>	No mention in the Code.	<p>S.21 refers. The tenant must provide a tenant's DS within 7 days of having received the landlord's DS. Penalty: 100 penalty units (natural person) and 500 penalty units (body corporate).</p> <p>The details required to be included are prescribed in the Regulations.</p> <p>If the lease is a renewal of an existing lease, a tenant's disclosure update which</p>



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given to the landlord, together with that earlier tenant's DS, is considered to be the tenant's DS. There is a penalty imposed of up to 50 penalty units if the landlord is not given a DS as required.	consent to the assignment.  S.22C refers. At least 7 days before an assignment of a lease, the landlord must give the assignee a DS and copy of the lease. Where the tenant is a major tenant (being tenants of 5 or more retail shops in Australia) the landlord is taken to have given the DS within the disclosure period if the major tenant gives certain notices.  The assignee must also provide a DS to the landlord.  S.22D refers. If the tenant or assignee is not a major tenant, a financial advice report and legal advice report must be given to the landlord.  S.22E(2) deems a retail tenancy dispute to exist if a person fails to comply with SS.22A - D and QCAT may be approached for an order.						updates the provisions of the tenant's DS previously given to the landlord, together with that previous tenant's DS, is considered to be the tenant's DS.
<b>LEASE COSTS AND FIT OUT COSTS</b>							
SS.13 and S.13A refer. S.13 applies if a tenant or prospective tenant of a retail shop is liable to pay for work carried out by or on behalf of the landlord (before or after the lease is entered into) to enable the proposed fit-out of the shop by the tenant. The maximum amount or formula payable is to be agreed between the parties before the lease is entered	S.48 refers. The landlord cannot recover expenses for preparation/renewing/ extending a lease but a tenant can be required to pay for: <ul style="list-style-type: none"> <li>stamp duty;</li> <li>registration fees;</li> <li>costs of survey; and</li> <li>reasonable mortgagee consent costs.</li> </ul>	S.51 refers. The landlord cannot recover expenses relating to: <ul style="list-style-type: none"> <li>negotiation, preparation or execution of the lease;</li> <li>obtaining the consent of a mortgagee to the lease; or</li> <li>the landlord's compliance with the Act.</li> </ul> This section does not prevent a landlord from	S.13 refers. The tenant may only be required to fit out or refit or provide fixtures, plant or equipment if the DS discloses the obligation and contains sufficient details for the tenant to obtain an estimate of likely costs.  S.14 refers. The tenant is not required to pay such costs until provided with copies of any account	S.9(2)(b) and (c) refer and until the amending Act is proclaimed the landlord can recover fair and reasonable expenses of the landlord in respect of drawing up of, or obtaining necessary consents to, a "lease" (as broadly defined).  Once the amending Act is proclaimed a landlord cannot claim from the tenant the landlord's legal	S.23 refers. Each party is to bear its own costs in relation to the preparation of the lease. If 1 party requires the lease to be registered, that party must pay any fee for registration. Stamp duty and the costs of obtaining a mortgagee's consent to the lease are deemed to be the landlord's costs.	S.8 refers. Each party is to bear his own costs in the preparation of the lease. The landlord may charge the tenant the cost of any alterations the tenant requires to the lease. If the prospective tenant gives written authorisation for the preparation of the lease. The tenant may agree in writing that if tenant withdraws from lease negotiations then the tenant	S.23 refers. A tenant must only pay the landlord's costs if the tenant is provided with a copy of the account presented to the landlord for those costs and the amount of the costs or the method of calculation of those costs is included within the landlord's DS. A tenant is not liable to pay any more than a "reasonable sum" for legal and other costs incurred in



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<p>into. The tenant is not liable to pay more than the agreed amount.</p> <p>If a prospective landlord of a retail shop in a RSC requires a particular standard of construction for fit-outs to be carried out by the tenant, relevant information about the standard is to be contained in a TFS. The TFS should be accompanied by the landlord's DS or in the lease or any agreement for the lease of the shop.</p>		<p>claiming the reasonable legal or other expenses incurred by the landlord in connection with an assignment of the lease or a sub-lease, including investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment or sub-lease.</p>	<p>rendered to the landlord. If tenant is liable for landlord's costs, the liability cannot exceed the stamp duty and registration fees and ½ of other "preparatory costs".</p> <p>Preparatory costs include:</p> <ul style="list-style-type: none"> <li>fees charged by a mortgagee for consenting to the lease; and</li> <li>costs of attendances on the tenant by the landlord or landlord's lawyer.</li> </ul> <p>(Note: This section does not limit the recovery of preparatory costs incurred by the landlord from a person who enters into and then withdraws from lease negotiations.)</p>	<p>or other expenses in relation to:</p> <ul style="list-style-type: none"> <li>negotiation, preparation or execution of the lease as well as an extension or renewal of lease;</li> <li>obtaining the consent of a mortgagee to the lease; or</li> <li>the landlord's compliance with the Act,</li> </ul> <p>but the above does not prevent a landlord from claiming reasonable legal or other expenses incurred by the landlord in connection with:</p> <ul style="list-style-type: none"> <li>an assignment of the lease; or</li> <li>a sublease; or</li> <li>obtaining any necessary consents to the assignment or sublease.</li> </ul> <p>The amending Act also inserts the following which go further than in other jurisdictions:</p> <ul style="list-style-type: none"> <li>a new S.12(3A) which renders void any provision in a retail shop lease that has the effect of requiring a tenant to contribute towards the landlord's finishes, fixtures, fittings, equipment or services unless the DS given under S.6 "contains a statement notifying the tenant of the effect of the provision"; and</li> <li>a new S.14C which renders void any</li> </ul>		<p>will be responsible for costs of preparation of lease. The parties are to negotiate payment of disbursements such as stamp duty and the costs of procuring mortgagee's consent.</p>	<p>connection with the preparation of a retail shop lease.</p>

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				<p>provision in a retail shop lease that requires a tenant to refurbish or refit the shop unless the provision 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",</p> <p>but neither of these amendments is retrospective and they will not apply to existing leases (including leases entered into pursuant to options to renew originally included in the lease).</p>			
<b>KEY MONEY PROHIBITED</b>							
<p>S.14 refers. The landlord is prohibited from obtaining key money or lease preparation expenses in connection with the granting of a lease and any provision to the contrary is void.</p> <p>The landlord may, however, recover from a tenant lease preparation expenses incurred in connection with making certain amendments to a proposed lease which were requested by the tenant.</p> <p>This section does not prevent a landlord from securing performance of the tenant's obligations under the lease by requiring the</p>	<p>S.39 refers. Payment of key money or amount for tenant's goodwill is prohibited.</p>	<p>S.23 refers. The landlord or any person on behalf of the landlord must not seek or accept payment of key money or any consideration for the goodwill of any business carried on at the retail premises and any provision to the contrary is void. Penalty: 50 penalty units.</p> <p>The landlord is not however prevented from:</p> <ul style="list-style-type: none"> <li>recovering from the tenant costs which the landlord reasonably incurred in investigating a proposed assignee of the lease or sub-tenant of the premises;</li> <li>recovering from the</li> </ul>	<p>S.15 refers. The landlord must not seek or accept payment of a premium in connection with the grant of a retail shop lease and any provision of retail shop lease is void to the extent it requires payment of a premium.</p> <p>S.20L refers. The tenant cannot be required to pay a premium for the renewal or extension of a retail shop lease.</p>	<p>S.9 refers. Any provision in a retail shop "lease" (as broadly defined) to the effect that the landlord or any person claiming through the landlord is entitled to or may require from the tenant:</p> <ul style="list-style-type: none"> <li>key money; or</li> <li>any consideration for the goodwill of any business carried on at the retail premises,</li> </ul> <p>is void, and any such sum paid or benefit conferred by the tenant is recoverable by the tenant as a debt due.</p> <p>Key money is defined in S.3(1) to include not only money paid, but also any benefit conferred by, or at the request or direction of, a</p>	<p>S.38 refers. The landlord must not ask for or accept key money for the grant of the lease, extension of the lease under option, renewal, assignment, sublease or mortgage of the lease, or consent to assignment, sublease or mortgage of a lease. Key money is defined to mean an amount paid by or on behalf of a tenant to, or at the direction of, a lessor, or any benefit given to, or at the direction of, a lessor, but does not include:</p> <ul style="list-style-type: none"> <li>rent; or</li> <li>a payment for the goodwill or other assets of a business genuinely operated by</li> </ul>	<p>S.9 refers. Key money payments are prohibited. Key money is defined in S.1 to mean any money paid to or at the discretion of a landlord or landlord's agent, or any benefit that is conferred on or at the direction of a landlord or landlord's agent, in connection with the granting, renewal, extension or assignment of a lease, and a reference in this Code to payment of key money includes a reference to the conferral of any such benefit.</p>	<p>S.24 refers. Key money is defined in S.5(1) to not only include money paid, but also "a benefit to be given" where either there is no real consideration or it is in consideration of a benefit in connection with the granting, renewal, extension or assignment of a retail shop lease.</p> <p>Key money does not include:</p> <ul style="list-style-type: none"> <li>payment for legal or other expenses;</li> <li>rent;</li> <li>bond, security deposit or guarantee;</li> <li>payment for goodwill of a business;</li> <li>payment for plant, equipment, fixtures or</li> </ul>

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provision of a security bond or other bond or guarantee from the tenant or any other person.		<p>tenant costs which the landlord reasonably incurred in connection with:</p> <ul style="list-style-type: none"> <li>– an assignment of the lease or a sub-lease; and</li> <li>– obtaining any necessary consents to the assignment or sub-lease;</li> </ul> <ul style="list-style-type: none"> <li>• claiming goodwill from the tenant in relation to the sale of a business that the landlord operated from the retail premises immediately before its sale, if the lease was granted to the tenant in the course of the sale of the business;</li> <li>• receiving payment of rent in advance;</li> <li>• securing the performance of the tenant's obligations under the lease by requiring a bond, security deposit or guarantee to be provided from the tenant or any other person (such as a requirement that the directors of a corporation guarantee performance of the corporation's lease obligations);</li> <li>• seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the landlord to the tenant in connection with the lease being granted; or</li> <li>• seeking and accepting</li> </ul>		<p>tenant by way of a premium or something of a like nature in consideration of the granting or agreeing to grant a lease or a renewal or assignment of a retail shop lease.</p> <p>In addition to any other benefits outlawed as key money, under S.9(1a) if the tenant is required to make a payment or provide the landlord with some other benefit in consideration of a rental reduction, that payment or other benefit is taken to be key-money and therefore void..</p> <p>S.9(2) permits the landlord to recover any sum:</p> <ul style="list-style-type: none"> <li>• a tenant has agreed to pay for the goodwill of a business carried on by the landlord in the retail shop concerned immediately before the lease was entered into; and</li> <li>• expenses reasonably incurred by the landlord in investigating a proposed assignee or subtenant;</li> <li>• permissible lease costs discussed above.</li> </ul>	<p>the lessor that is sold or to be sold by the lessor to the tenant; or</p> <ul style="list-style-type: none"> <li>• a bond or security deposit, or a guarantee by way of security; or</li> <li>• an amount payable on account of outgoings; or</li> <li>• a reasonable amount payable to someone for attendances on the tenant in relation to the preparation of documents that are relevant to a lease; or</li> <li>• any reasonable amount payable to a lessor for goods and services provided, or to be provided, to the tenant; or</li> <li>• an amount allowed to be paid under this Act.</li> </ul> <p>The tenant may recover key money paid as a debt owing by the landlord.</p>		<p>fittings that are sold by the landlord to the tenant;</p> <ul style="list-style-type: none"> <li>• payment for the grant of a franchise.</li> </ul> <p>A landlord or person acting on behalf of a landlord must not seek or accept key money in connection with granting a lease. Penalty: 100 penalty units (natural person) and 500 penalty units (body corporate).</p> <p>A lease is void to the extent that it requires key money.</p> <p>The tenant may recover key money as a debt owed to the landlord.</p>

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		payment for the grant of a franchise in connection with the lease being granted.					
<b>MINIMUM 5 YEAR TERM OF LEASE</b>							
S.16 refers. A retail shop lease (including any further option term for an extension or renewal) must be for a term of not less than 5 years. However, this section does not apply to a lease which results from the renewal of an earlier lease nor does it apply if a lawyer or a licensed conveyancer not acting for the landlord certifies (before, or within 6 months after the lease has been entered into) in writing that the tenant requested the lawyer or conveyancer to give the certificate and to explain to the tenant the effects of the section. Regulations may prescribe matters that must be included in a certificate.	No prescribed minimum term.	S.21 refers. The term of a retail premises lease (including any further term) must be at least 5 years or if the term remaining under any head lease under which the landlord holds the premises is 5 years or less, the length of that remaining term less 1 day. This does not apply if the tenant or prospective tenant, obtains a certificate from the SBC which certifies that the effect of the section and the certificate have been explained to the tenant and the tenant provides to the landlord a copy of the certificate of the SBC.  The SBC must consider a request made within 90 days after entry into the lease and has the discretion to consider a request made outside that time.	SS.20B and 20K refer. Minimum 5 year term. 'Term' assumes any right of renewal will be exercised. But a right of renewal given after the lease is entered into will not be considered. However, the section does not apply to: <ul style="list-style-type: none"> <li>a lease containing a certified exclusionary clause (a certificate signed by a lawyer to the effect that the effect of the minimum term provision has been explained, and that the tenant gave assurances that the tenant was not acting under coercion or undue influence);</li> <li>a fixed term lease of 6 months or less;</li> <li>a lease arising from holding over for less than 6 months;</li> <li>a tenant who has been in possession for at least 5 years;</li> <li>a sublease where the term is as long as the head lease allows; and</li> <li>a lease excluded by regulation.</li> </ul>	S.13 refers. Minimum 5 year term. Provisions differ markedly from other States and will continue to do so under the amending Act in approving early break clauses.  The SBC does not take over the role of SAT in relation to early break clauses - that role remains with SAT.  There is no ability in WA to get a statement from the tenant, licensed conveyancer or tenant's lawyer so as to prevent the statutory option term arising or to contract out of providing benefits to the tenant on a termination where the Act requires those benefits to be provided. Furthermore the WA SAT will continue to play a major role after the amending Act is proclaimed.  However, the changes to S.13 in the amending Act are <b>not</b> retrospective and will not apply to "existing leases".  Under S.13(1) if: <ul style="list-style-type: none"> <li>the current term of a retail shop lease is less than 5 years; and</li> </ul>	S.104 refers. The tenant has a right to extend the term to 5 years if the "total term" of the lease is less than 5 years, and the tenant was not (before entering lease) advised independently about the effect of S.104 and extension of the lease is not: <ul style="list-style-type: none"> <li>inconsistent with the terms of a head lease; or</li> <li>unlawful.</li> </ul>	SS.10(3) and 10(4) refer. Minimum 5 year term. Except where tenant obtains a certificate from tenant's legal advisor certifying that he has explained to the tenant the effect of a reduced lease period.	S.26 refers. There is a minimum 5 year term except where the tenant obtains a certificate from a legal practitioner or accountant not acting for the landlord certifying that he has explained the effect of a reduction in the lease term.

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				<ul style="list-style-type: none"> <li>the current term of that retail shop lease plus any available option terms contained within the lease totals less than 5 years,</li> </ul> <p>then the lease is deemed to give the tenant an option to renew for a statutory option that would give the tenant in total a 5 year term. (As noted above, under the amending Act this would not apply to a short term lease with an aggregate term of not more than 6 months by a tenant in continuous possession).</p> <p>S.13(2) provides that S.13(1) does not apply to a retail shop lease in respect of premises if:</p> <ul style="list-style-type: none"> <li>the tenant occupied the premises as retail shop for a period immediately before the current term commenced and that period plus the current term and any option terms in the lease would give the tenant in total a 5 year term; or</li> <li>if the landlord holds the premises as tenant itself under a head lease and the renewal of the retail shop lease would exceed the term (as extended or renewed) available to the landlord,</li> </ul> <p>and in such cases under the Act the landlord can terminate the lease without paying the tenant any compensation or offering a</p>			

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				<p>new lease (unless this has been contractually agreed between the parties in the lease).</p> <p>Where a tenant assigns the retail shop lease, the term the assignee is entitled to is only the balance of the term (including any options or statutory option) that the assignor is entitled to at the date of assignment.</p> <p>If a tenant wishes to exercise the statutory option it must give notice in the prescribed form to the landlord at least 90 days before the expiry of the lease (or such other notice period as the WA SAT may approve in the circumstances). (The amending Act changes that 90 day period to 30 days)</p> <p>The statutory option is not exercisable while the tenant is in default.</p> <p>S.13, in relation to leases where the amending Act does not apply, has the effect that:</p> <ul style="list-style-type: none"> <li>If the landlord wishes to terminate the lease before the end of the 5 year period under S.13(1) (other than for default) the landlord must have obtained the WA SAT's approval to the inclusion in the lease of the clause (e.g. terminating for a redevelopment) that would enable the</li> </ul>			

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				<p>landlord to do so. The WA SAT has a discretion to approve the clauses if the WA SAT is satisfied special circumstances exist and a discretion as to the conditions of approval imposed.</p> <ul style="list-style-type: none"> <li>If the landlord wishes to grant the tenant a retail shop lease for a term of less than 5 years and wishes to prevent the statutory option from arising, the <b>tenant</b> (of the tenant's own free will) must apply to the WA SAT and obtain from the WA SAT an order that the statutory option will not arise.</li> </ul> <p>Under the amending Act the above would still apply but the regulations can be used to prescribe a provision that, if included in the lease, would do away with the need for WA SAT approval to its inclusion. The landlord could terminate under that clause before the tenant has had 5 years' possession.</p> <p>The amending Act in S.13(6)(ab) appears to go further than the above and to make a substantial change to the process by enacting provisions that fall outside S.13(1) and therefore outside S.13(2) (i.e. which allow prior periods of possession to be taken into account in</p>			

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				<p>determining whether or not the tenant has had 5 years possession). S.13(6)(ab) refers to the <b>current term</b> (and any option term) and prevents the landlord from terminating such a lease before 5 years after the <b>current term</b> commenced.</p> <p>It is arguable that this could be interpreted to mean it will still be necessary to obtain WA SAT approval to an early break clause, even though the tenant may have previously had 5 years' possession. Again the regulations can be used to prepare a pre-approved clause that if followed would circumvent the need for WA SAT approval.</p> <p>In other words, the amending Act would appear to set 2 different regimes for termination and compensation rights depending on whether the tenant has already had 5 years' possession before the termination or whether it has not.</p> <p>The intent may become clearer, once the regulations are enacted, by showing what is envisaged in the precedent clauses.</p>			
<b>SECURITY BONDS</b>							
Part 2A and SS.16A-16ZC refers. A landlord is not entitled to unreasonably refuse a tenant's choice to use a bank guarantee or some other form of security.	No mention in the Act.	S.24 refers. The landlord must keep a security deposit in an interest-bearing account and account to the tenant for any interest earned.	SS.19 and 20 refer. A person cannot require more than 1 security bond for the same shop or require the payment of an amount by way of security under a security bond exceeding the	No mention in the Act and security bonds are permissible.	S.39 refers. Any bond must not be more than the rent payable for a 3 month period under lease.  S.41 refers. The landlord must not unreasonably	S.30 refers. The landlord must not unreasonably refuse to accept a bank guarantee instead of a security deposit (S.30(4)).  Security deposit limited to	S.63 refers. Security deposits have to be held either in an interest bearing account or in a licensed real estate agent's account.  If the landlord holds the



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<p>Where a landlord receives a security bond for a lease or a proposed lease on or after the commencement of this section, the landlord is to deposit with the Director-General an amount of money equivalent to the amount of the security bond.</p> <p>Where S.16D applies, the landlord or the landlord's agent must deposit with the Director-General within 3 months after the relevant day an amount equivalent to the current balance of the amount deposited or paid.</p> <p>No one other than the Director-General is to receive interest in respect of the bond.</p> <p>An application to the Director-General to pay out an amount of money may be made:</p> <ul style="list-style-type: none"> <li>(a) jointly by the landlord and tenant; or</li> <li>(b) by landlord alone; or</li> <li>(c) by the tenant alone.</li> </ul> <p>The Director General may, not earlier than 14 days after receiving notice of a judgement or order relating to a security bond, pay out money even if there is a right of appeal against the judgement or order.</p> <p>An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence</p>			value of 4 weeks' rent.		<p>refuse to accept a bank guarantee instead of a bond.</p> <p>S.42 refers. The landlord must account to the tenant for any interest earned on bonds which must be invested by the landlord in an interest bearing account.</p>	<p>3 months' rent (S.30(1)).</p> <p>The landlord must account to the tenant for interest. This security deposit must be held in interest bearing account.</p>	<p>security deposit, it must account to the tenant for interest earned but the landlord is entitled to capitalise the interest so that it forms part of the security deposit.</p> <p>Landlords are not entitled to unreasonably refuse to accept a bank guarantee in satisfaction of the requirement to provide a security deposit.</p>

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<p>against this part and the regulations prescribe the offence as being one where a penalty notice may be issued.</p> <p>Division 5: the following accounts are to be established in accordance with the law:</p> <ul style="list-style-type: none"> <li>• a Retail Leases Security Bonds Trust Account; and</li> <li>• a Retail Leases Security Bonds Interest Account.</li> </ul>							
<b>RENT REVIEWS</b>							
<p>S.18 refers. Rent reviews cannot take place more than once a year. This restriction applies, for example, to market rent reviews, but not to reviews by a specified amount or specified percentage. In addition, a provision of a lease is void if it reserves to one party a discretion as to which of 2 or more methods of calculating a change to base rate is to apply, or the discretion to elect whether or not rent is to be reviewed on a review date, or provides for rent to be changed to the higher of 2 or more specified methods. Ratchet provisions or provisions limiting the amount of a decrease in rent are prohibited.</p>	<p>SS.27, 28, 36 and 36A refer. The lease must state timing and bases of reviews. Reviews may be made only once a year (except the first year) and can be made on different bases throughout the year. The bases may comprise one method (eg. CPI) or a combination of 2 or more methods limited to the following: Index (ie CPI), Fixed Percentage, Actual Amount and another basis prescribed by regulation.</p> <p>The Act also allows rent to be reviewed to the average of the base and turnover rents payable during the previously year/s and caps on rent increases.</p> <p>Ratchet provisions and requirements for the rent to be calculated on the higher of 2 or more bases are void or invalid as are provisions allowing a party the discretion to decide which</p>	<p>S.35 refers. Only 1 of a fixed number of methods of review may be used at any one time.</p> <p>Any rent review provision unless it is one of the methods fixed under the Act is void to the extent that it purports to preclude, or prevents or enables a person to prevent, the reduction of the rent or to limit the extent to which the rent may be reduced.</p>	<p>S.22 refers. Review provisions are void in a similar fashion to NSW.</p>	<p>S.11 refers. There is no prescription concerning the dates for review. However:</p> <ul style="list-style-type: none"> <li>• A rent review provision in a retail shop lease is void unless the lease specifies, for each review date, only 1 method of reviewing the rent. If the review provisions are void the Act does not provide replacement provisions.</li> </ul>	<p>S.47 refers. A lease provision is void if it allows a change to rent more than once in each year after the first anniversary of the lease, except where the provision:</p> <ul style="list-style-type: none"> <li>• allows the sublandlord to pass on to the subtenant rent increases under a head lease;</li> <li>• sets out the steps by which rent will increase at predetermined times during the lease;</li> <li>• allows for changes to rent attributable to GST;</li> <li>• allows for abatement of rent;</li> <li>• allows review of rent on the exercise of an option to extend the lease; and</li> <li>• allows for adjustment to turnover rent under S.63.</li> </ul>	<p>S.12 refers. The lease must state the method by which rent is to be adjusted. Adjustments are not permitted during the first 12 months of a lease or more frequently than once in each 12 month period. The lease must specify the date for each adjustment of rent otherwise an adjustment cannot be made. The method of adjustment is confined to one of the following methods:</p> <ul style="list-style-type: none"> <li>• CPI (All Groups Hobart) or other agreed CPI Index;</li> <li>• agreed percentage;</li> <li>• current market value rent;</li> <li>• agreed amount;</li> <li>• in accordance with an agreed formula other than a formula that involves a combination of any of 2 or more of the above methods.</li> </ul>	<p>S.28 refers. Leases must state when reviews are to take place and the bases upon which those reviews are to be made. A rent review provision that does not specify how the review is to be made is void. A provision of a lease is void if it gives the landlord a choice of review methods on the same review date. Ratchet provisions which prevent or limit the amount by which rent can be reduced are void (except where an independently published index is used), but the basis for review may provide for increases by fixed percentages or fixed amounts. If a review is not initiated by a landlord within 90 days of the due date, the tenant may initiate a review.</p>

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	<p>of 2 or more methods should be used.</p> <p>If an invalid review occurs, the outcome will depend on the breach, e.g. reviews to the higher of 2 bases allow the tenant to choose the basis.</p> <p>The limitation on review methods do not apply to major tenants provided certain notices are received from the tenant. However the prohibition of ratchets and multiple review methods in S.36 still applies.</p>				<p>S.50 refers. Any purported rent change is void if the lease does not:</p> <ul style="list-style-type: none"> <li>state the date each rent review is due; or</li> <li>provide a mechanism so the date of each rent review can be easily worked out.</li> </ul>	<p>Lease provisions are invalid if either rent adjustment is permitted by reference to more than 1 of the above methods, or if they reserve a discretion to apply more than 1 of the above methods. If the lease provision relating to adjustments contravenes the Code, then rent must be determined in accordance with the market rent review procedure prescribed by S.21 of the Code. A lease provision which prohibits a decrease in rent (i.e. a ratchet clause) is invalid.</p>	
<b>MARKET RENT REVIEWS</b>							
<p>S.19, 19A and 31A refer. The CMR of a retail shop is the rent that would be reasonably expected to be paid for the shop, as between a willing landlord and a willing tenant in an arm's length transaction (where the parties are each acting knowledgeably, prudently and without compulsion) determined on an effective rent basis having regard to specified matters. Similar provisions also apply to an option to renew a lease at a current market rent.</p> <p>The specified matters are:</p> <ul style="list-style-type: none"> <li>the provisions of the lease;</li> <li>the rent that would reasonably be expected to be paid if the shop were unoccupied and offered for renting for</li> </ul>	<p>SS.28-36A refer. If rent is to be reviewed to the CMR and the parties cannot agree on what this figure will be, the CMR is to be determined by a SRV.</p> <p>A provision of a lease is void to the extent that:</p> <ul style="list-style-type: none"> <li>the tenant is to pay the SRV's costs (other than their ½ share);</li> <li>determination of CMR is other than in accordance with the Act.</li> </ul> <p>In making a determination of CMV, the SRV must determine the rent:</p> <ul style="list-style-type: none"> <li>reasonably expected to be paid for the retail shop if it were unoccupied and offered for the use for which it may be used under the lease or a substantially</li> </ul>	<p>S.37 refers. A retail premises lease that provides for a rent review to be made on the basis of the current market rent of the premises is taken to provide that the current market rent review is the rent obtainable at the time of the review in a free and open market between a willing landlord and a willing tenant in an arm's length transaction having regard to:</p> <ul style="list-style-type: none"> <li>the provisions of the lease;</li> <li>the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease;</li> <li>the landlord's</li> </ul>	<p>S.23 refers. Similar to NSW, except no provision requiring rent concessions and other benefits to be taken into account. The Act provides for appointment of a valuer if the landlord and the tenant cannot agree. The costs of a valuation must be shared by the landlord and tenant.</p>	<p>S.11 refers. In respect of a market review under a retail shop lease:</p> <ul style="list-style-type: none"> <li>The Act's definition of CMR prevails over any definition in the lease.</li> <li>CMR is defined in S.11(2)(a) to be the rent obtainable at the time of review in a free and open market as if all the relevant factors, matters or variables used in proper land valuation practice have been taken into account, and as if the retail shop were vacant and to be let on similar terms as are contained in the current retail shop lease.</li> <li>The amending Act inserts additional provisions (that will apply retrospectively once proclaimed)</li> </ul>	<p>SS.52, 53, 54, 55, 57, 58, and 59 refer. If the parties are unable to agree on market rent, either party may request the Magistrates Court to refer the dispute to mediation. If mediation does not result in agreement, the market rent is to be determined by valuation in accordance with the principles set out in Schedule 1.</p> <p>Under Schedule 1, market rent is the rent that could reasonably be expected to be paid for vacant possession of the premises on the open market if:</p> <ul style="list-style-type: none"> <li>the premises were let by a willing but not anxious landlord to a willing but not anxious tenant;</li> <li>both parties acted knowledgeably and</li> </ul>	<p>S.S.13, 14 and 21 refer. Market value rent is defined in S.1 to mean the rent determined in accordance with the principles set out in Appendix A of the Code. If the parties cannot agree on the market value rent, then either party may initiate an independent valuation by the appointment of a valuer.</p>	<p>S.29 refers. "Current market rent" is defined to be the rent that could be reasonably expected to be paid for the premises, determined on an effective rent basis having regard to:</p> <ul style="list-style-type: none"> <li>the provisions of the lease;</li> <li>the rent that could reasonably be expected to be paid for the premises if they were unoccupied and offered for rent for the same or substantially similar use to which the premises may be put under the lease;</li> <li>the gross rent less the landlord's outgoings payable by the tenant; and</li> <li>rent concessions and other benefits that are frequently generally offered to prospective</li> </ul>

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<p>the same or similar use;</p> <ul style="list-style-type: none"> <li>the gross rent less outgoings payable; and</li> <li>the rent concessions and other benefits.</li> </ul> <p>Where the landlord and tenant cannot agree on the amount of rent, the amount is to be determined by a SRV.</p> <p>The CMR is not to take into account the value of goodwill attributable to the tenant. If the landlord and tenant do not agree as to the amount the rent is to be, the amount is to be determined by a SRV.</p> <p>Within 14 days after request by a SRV, the landlord must supply relevant information requested in a list provided by the valuer to assist in determining the CMV, including information about leases for retail shops situated in the same building or shopping centre to assist the SRV to determine the CMR. The SRV's determination is to be in writing, contain reasons for his or her determination and detail the matters considered in making such determination.</p> <p>The costs of the SRV are to be split between the parties.</p> <p>The SRV's determination must be made within 1 month after accepting the appointment to make the</p>	<p>similar use;</p> <ul style="list-style-type: none"> <li>on the basis of gross rent less the landlord's outgoings payable by the tenant, and</li> <li>on an effective rent basis.</li> </ul> <p>The SRV must:</p> <ul style="list-style-type: none"> <li>not have regard to the value of the goodwill of the business;</li> <li>have regard to the terms and conditions of the lease;</li> <li>have regard to submissions from the parties as to market rent; and</li> <li>have regard to other matters prescribed by regulation.</li> </ul> <p>The SRV may require the landlord to give him relevant information about the leases in the shopping centre, and if no information is given, within 7 days after this failure a "retail tenancy dispute" is said to exist.</p> <p>The information obtained by the SRV is to be confidential.</p> <p>The SRV's determination is to be in writing, state the matters taken into consideration in making the determination and state detailed reasons for the determination and must be made within 1 month of the final information being provided to the SRV or the finalisation of the submissions period in</p>	<p>outgoings to the extent to which the tenant is liable to contribute to those outgoings; and</p> <ul style="list-style-type: none"> <li>rent concessions and any other benefits offered to prospective tenants of unoccupied retail premises.</li> </ul> <p>The current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings.</p> <p>If the landlord and tenant do not agree on the amount of rent, the provisions are similar to NSW except that:</p> <ul style="list-style-type: none"> <li>if there is no agreement on the valuer, it is appointed by the SBC; and</li> <li>the valuer must carry out the valuation within 45 days of accepting the appointment, or within such longer period as may be agreed between the landlord and tenant or as determined by the SBC.</li> </ul>		<p>requiring that no account is taken of:</p> <ul style="list-style-type: none"> <li>the good will of the business carried on by the tenant; or</li> <li>any stock, fixtures or fittings in the retail shop that are not the property of the landlord; or</li> <li>any structural improvements or alterations of the retail shop carried out or paid for by the current tenant.</li> </ul> <ul style="list-style-type: none"> <li>Provisions in the lease preventing or limiting either the increase or decrease of the CMR (i.e. ratchets and caps or collars) are void.</li> <li>Unless specific provision is made in the lease for the time at which a review may be initiated in respect of a review date, a party to the lease may, not more than 3 months before and not 6 months after the review date, initiate the review by serving notice on the other party.</li> <li>If the parties cannot agree on the rent payable for any review, the rent shall be determined by either a single licensed valuer agreed on by the parties (or nominated at the request of each of the parties by the SBC) or by 2 licensed valuers, one appointed by the landlord and the other by the tenant.</li> </ul>	<p>prudently; and</p> <ul style="list-style-type: none"> <li>the use to which the premises may be put under the lease is taken into consideration.</li> </ul> <p>Schedule 1 also sets out the matters that the valuer must:</p> <ul style="list-style-type: none"> <li>take into account; and</li> <li>not take into account.</li> </ul> <p>If a valuer working out market rent asks the landlord for information about any relevant concession the landlord has given to another tenant, the landlord must give the valuer the information.</p> <p>Where rent is being worked out by mediation or a valuer under S.52 or S.53, but this is not done by the review date, rent is payable at the old rate until the new rent is worked out, with appropriate adjustment to then be made between the parties within 30 days.</p> <p>The Act provides a mechanism (on the application of a party) for disqualification of a valuer and appointment of a new valuer where the appointed valuer has a conflict or fails to comply with valuation obligations under the Act.</p>		<p>tenants of unoccupied retail shops.</p> <p>The tenant's goodwill is not to be taken into account and nor is the value of the tenant's fixtures and fittings.</p> <p>If the landlord and tenant cannot agree the market rent is to be determined by a valuer. The cost of the valuer is to be shared by the parties.</p> <p>If the parties cannot agree upon the appointment of a valuer, the appointment will be made by the Commissioner of Business Tenancies.</p>

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determination.	S.28A.			<ul style="list-style-type: none"> <li>If the parties do not agree on a single valuer or do not appoint their single valuer or do so but the 2 valuers do not reach agreement on behalf of the parties then a party may refer the rent review to the WA SAT for determination.</li> </ul> <p>S.11 does not contain such detailed procedural clauses as the NSW Act does. For example, there are no time periods for action.</p> <p>Under S.11 a valuer, at the request of a party and on payment of the required fee, must provide written reasons for the valuer's decision.</p> <p>The amending Act obliges the landlord to provide, within 14 days after request by the relevant valuer(s) seeking to agree or determine the CMR, such relevant information required by the valuer(s) to assist in the review. The information that can be required of the landlord includes any of the following information about leases for any retail shops in the same building or RSC (whether or not the premises are comparable):</p> <ul style="list-style-type: none"> <li>current rental for each lease;</li> <li>rent free periods or any other form of incentive;</li> <li>recent or proposed variations of any lease;</li> <li>outgoings for each</li> </ul>			

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				<p>lease;</p> <ul style="list-style-type: none"> <li>any other information that may be prescribed in the Regulations,</li> </ul> <p>and the above is retrospective once proclaimed. If the landlord fails to comply with a request without reasonable excuse then the tenant can apply to the WA SAT for an order compelling the landlord to supply the information requested. S.11A is inserted in the Act dealing with confidentiality and it allows disclosure by the determinator as part of the reasons for the determination, as long as the particular tenant or business is not identified. It also seems that if a party wishes to bring legal proceedings the determinator can provide that party with the confidential information for the purpose of the legal proceedings.</p> <p>If the WA SAT is required to make a determination in respect of the CMR, the WA SAT:</p> <ul style="list-style-type: none"> <li>must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms;</li> <li>will not be bound by rules of evidence;</li> <li>may inform itself on any matter in such manner as the WA SAT thinks fit;</li> <li>may require the parties</li> </ul>			

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				<p>to furnish such valuations, documents or other information as the WA SAT thinks fit and the parties must comply with the request.</p> <p>A provision in a retail shop lease preventing the tenant from disclosing the rent under the lease is void.</p>			
<b>RENT VARIATIONS FOR SHORT-TERM LEASES</b>							
S.21A refers. If a lease is extended to a 5 year term, the landlord may change the rent from the date of commencement of the additional period and then annually, in line with movements in the CPI for Sydney.	No mention in the Act	No mention in the Act.	No mention in the Act.	<p>S.13(5) refers. If a retail shop lease is extended to a 5 year term pursuant to the statutory option in S.13(1), the terms and conditions of the lease applicable at the time the statutory option is exercised will apply (other than any options to renew).</p> <p>However, if that retail shop lease does not provide for a review of rent, then the lease will be taken to provide that in respect of the statutory option term the rental payable is the CMR.</p>	No mention in the Act.	No mention in the Act.	No mention in the Act.
<b>OUTGOINGS (General)</b>							
SS.22-19 refer. The tenant is not liable to pay any amount to the landlord in respect of outgoings except in accordance with the provisions of the lease.	<p>SS.7 and 37 refer. Type of outgoings to be charged must accord with provisions of Act. The lease must specify how outgoings are to be paid, determined, apportioned and recovered.</p> <p>S.24 refers. Subject to the Act, a lease cannot contain a provision requiring the tenant to make payments</p>	S.39 refers. The lease must specify recoverable outgoings, how the outgoings are to be determined and apportioned to the tenant, and how those outgoings may be recoverable by the landlord from the tenant.	<p>S.26 refers. The tenant is not liable to pay outgoings unless the provisions of the lease specify:</p> <ul style="list-style-type: none"> <li>the outgoings that are to be regarded as recoverable;</li> <li>how the amount of outgoings will be determined and apportioned; and</li> <li>how the outgoings may be recovered by the</li> </ul>	<p>S.12 refers and any amendments in the amending Act will also apply retrospectively once proclaimed.</p> <p>The tenant is not liable to pay an amount in respect of the landlord's "operating expenses" except to the extent that the retail shop lease specifies:</p> <ul style="list-style-type: none"> <li>the items of operating</li> </ul>	<p>S.70 refers. The landlord may only recover from the tenant:</p> <ul style="list-style-type: none"> <li>a reasonable expense directly related to the operation of, or a reasonable expense of repairing or maintaining: <ul style="list-style-type: none"> <li>for shopping centre premises - an area used in connection with</li> </ul> </li> </ul>	S.18 refers. The landlord may require the tenant to contribute to outgoings and major items of repair and maintenance that are directly attributable to the operation of the premises. The lease must state in detail which outgoings are recoverable and how unforeseen outgoings are to be dealt with, and the method used to calculate	S.38 refers. The tenant is not liable to pay outgoings unless the lease specifies the outgoings that are recoverable, how the amount of those outgoings will be determined, how they will be apportioned to the tenant, and how those outgoings may be recovered by the landlord from the tenant.

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	<p>other than for rent or the landlord's outgoings or a specified part of such outgoings, damages for breach and indemnity.</p> <p>S.53 refers. There is a limit on the landlord's recovery of outgoings incurred outside core trading hours.</p>		<p>landlord.</p> <p>Costs associated with the advertising or promotion of a retail shop or retail shopping centre are not outgoings for the purpose of this section of the Act.</p> <p>(Note: Refer to S.30 regarding restrictions on land tax.)</p> <p>S.13 refers. Not recoverable and a provision to the contrary is void except:</p> <ul style="list-style-type: none"> <li>a tenant may be required to reimburse the cost of making good damage to the premises arising when the tenant is in possession of the premises;</li> <li>a tenant may be required to fit the shops or provide fixtures, plant or equipment if the DS discloses the obligation and estimates the cost; and</li> <li>a tenant may be required to contribute to a sinking fund to cover major items of repair or maintenance if reasonable details are disclosed in the DS.</li> </ul> <p>A provision requiring a tenant to make or reimburse capital expenditure is void unless it is a "permissible" obligation (as described above).</p>	<p>expenses that are to be regarded as recoverable wholly or in part from the tenant;</p> <ul style="list-style-type: none"> <li>how the amount of an operating expense will be determined and, where applicable, apportioned to the tenant; and</li> <li>how and when an amount payable by the tenant is to be paid by the tenant,</li> </ul> <p>and in any event the tenant's proportion of operating expenses cannot be greater than the "relevant proportion" without the approval of the WA SAT.</p> <p>The amending Act will remove the concept of "floor area" so as to address the interpretation issues in the Act and will replace that concept with "lettable area" - being the area of a retail shop defined or calculated:</p> <ul style="list-style-type: none"> <li>in such manner prescribed by the Regulations; and</li> <li>if the shop is part of a "group of premises" in the same or substantially the same way for all retail shops in the group.</li> </ul> <p>The concept of a "group of premises" is introduced by the amending Act to mean either:</p> <ul style="list-style-type: none"> <li>a RSC; or</li> <li>2 or more premises at least 1 of which is a retail shop that are adjacent to each other</li> </ul>	<p>the retail area of a shopping centre that contains the premises; or</p> <ul style="list-style-type: none"> <li>in any other case - the building that contains the premises;</li> <li>rates, taxes, levies or other statutory charges payable by the landlord;</li> <li>in relation to shopping centre premises - the reasonable cost of promoting the premises or centre; and</li> <li>an outgoing or expenditure incurred in obtaining statistical information.</li> </ul> <p>S.71 refers. The tenant must pay an amount to the landlord for outgoings only if:</p> <ul style="list-style-type: none"> <li>the nature of the outgoings was stated in the DS; and</li> <li>the lease states: <ul style="list-style-type: none"> <li>the outgoings that may be recovered by the landlord;</li> <li>how the amount of the outgoings will be worked out and apportioned to the tenant;</li> <li>how the outgoings or part of them may be recovered from the tenant; and</li> <li>the outgoings are "recoverable outgoings" (as defined under</li> </ul> </li> </ul>	<p>outgoings, and the time for payment of the outgoings.</p>	<p>Costs associated with the promotion of a retail shop or retail shopping centre are not considered to be outgoings for the purposes of S.38.</p>



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			<p>A tenant cannot be required to compensate the landlord for depreciation attributable to ordinary wear and tear.</p>	<p>or form a cluster and which:</p> <ul style="list-style-type: none"> <li>- have a common head lessor; and</li> <li>- are grouped together for the purpose of allocating to each of those premises a portion of an item of expense,</li> </ul> <p>and includes any part of the group.</p> <p>The "relevant proportion", in relation to a retail shop that is part of a "group of premises", is the proportion that the "lettable area" of the retail shop bears to the "total lettable area" of the group of premises at the commencement of the accounting year, with the overriding requirements that:</p> <ul style="list-style-type: none"> <li>• a tenant of a retail shop in a group of premises is not liable to contribute to costs which are not specifically referable to that shop; and</li> <li>• regard is to be had only to those premises that benefit from the expense in calculating the proportion.</li> </ul> <p>"Total lettable area" is redefined in the amending Act to mean:</p> <ul style="list-style-type: none"> <li>• the lettable areas of the premises that are retail shops (or set aside for retail shops); and</li> <li>• for any premises that are not retail shops, the</li> </ul>	S.70).		

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				<p>lettable area of those premises defined or calculated in such manner prescribed by the Regulations.</p> <p>There is no requirement for operating expenses to be reasonably and properly incurred in order to be recoverable from the tenant (unless the retail shop lease itself contains that requirement).</p> <p>Under S.12(1)(c) the landlord cannot require a tenant (under a retail shop lease of premises which form part of a cluster of premises) to contribute to operating expenses outside the "standard trading hours" if the tenant did not open for trade outside the standard trading hours. "Standard trading hours" are the hours prescribed from time to time under the Regulations as core trading hours.</p>			
<b>DEPRECIATION, CAPITAL COSTS, CHARGES INCURRED BY LANDLORD ON BORROWINGS AND COSTS OF LANDLORD ASSOCIATED WITH UNRELATED LAND</b>							
SS.23, 24, 24A and 24B refer. These are not recoverable from the tenant and any provision to the contrary is void.	S.7(3) refers. The landlord cannot recover from tenant as outgoings: <ul style="list-style-type: none"> <li>land tax;</li> <li>expenditure of a capital nature including the amortisation of capital costs;</li> </ul>	SS.41-45 and 50 refer. The landlord cannot recover from tenant as outgoings: <ul style="list-style-type: none"> <li>capital costs of the building in which the premises are located or any areas used in association with the building or of plant in</li> </ul>	S.13 refers. Similar to NSW S. S.23 and 24. However, no equivalent to NSW s.s. 24A or 24B.  (Note: Refer to S.13 regarding Outgoings).	S.12 refers. Under S.12(2) a provision in a retail shop lease of premises in a RSC which would require the tenant to make a payment to or for the benefit of the landlord (whether by way of contribution to a sinking fund, as part of the	S.70 refers. The tenant can only be liable for "recoverable outgoings" and, under SS.76 and 77, a lease provision is void if it requires the tenant to pay an amount for capital costs or depreciation.	S.S.18(2) and 18(4) refer. Prohibited.  The tenant is not liable for the following outgoings: <ul style="list-style-type: none"> <li>capital expenditure in relation to the premises;</li> <li>any contribution by the</li> </ul>	SS.43, 44 and 45 refer. Provisions within leases requiring the tenant to pay any capital costs, depreciation or interest or other charges incurred by a landlord in respect of its borrowings, are void.

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	<ul style="list-style-type: none"> <li>contributions to a depreciation or sinking fund;</li> <li>insurance premiums for loss of profits;</li> <li>landlord's contributions to merchants associations and centre promotion funds;</li> <li>payment of interest and charges on amounts borrowed by the landlord; or</li> <li>any other item prescribed by regulation.</li> </ul>	<p>the building (unless there is a provision in the lease that requires the tenant to undertake capital works at the tenant's own cost);</p> <ul style="list-style-type: none"> <li>depreciation;</li> <li>contribution to a sinking fund to provide for capital works;</li> <li>interest or other charges incurred by the landlord in respect of amounts borrowed by the landlord;</li> <li>rent under a head lease or rent and any other costs associated with other land; or</li> <li>from 1 July 2003, land tax.</li> </ul> <p>S.49 refers. From 1 July 2003, management fees are only recoverable if:</p> <ul style="list-style-type: none"> <li>they relate to the management of the building/centre in which the premises are located; and</li> <li>the lease or DS specifies the amount of the management fee and its rate/method of calculation.</li> </ul> <p>Management fees cannot increase annually by more than the adjustment in CPI. The amount of salaries and administrative costs are not included in the indexation base.</p>		<p>operating expenses or however) for or in respect of the amortisation of all or part of the costs of or incidental to:</p> <ul style="list-style-type: none"> <li>the construction of the RSC; or</li> <li>any extension of or structural improvement to the RSC; or</li> <li>any plant or equipment that is or becomes the property of the owner of the RSC,</li> </ul> <p>is void.</p> <p>In addition to the above proscription, in respect of any retail shop lease:</p> <ul style="list-style-type: none"> <li>management fees (defined in S.3(1) to include costs of and incidental to the collection of rent or other moneys or the management of premises such as costs in respect of management offices, plant and equipment and staff) are not recoverable from the tenant: S.12(1f);</li> <li>land tax is limited as set out below.</li> </ul> <p>Other than the above (and the S.9 proscriptions concerning key-money) there are no prohibited inclusions in the operating expenses and the general operating expenses provisions above apply, for example, the specificity required in the lease.</p>		<p>landlord to depreciation or a sinking fund;</p> <ul style="list-style-type: none"> <li>any contribution by a landlord to promotion and advertising;</li> <li>any interest or charge on money borrowed by the landlord;</li> <li>any insurance premium for loss of income by the landlord;</li> <li>any outgoings not specified in the lease that were reasonably foreseeable at the time the lease was entered into.</li> </ul> <p>The Landlord may not recover depreciation from tenant.</p>	
<b>SINKING FUND</b>							
SS.25, 25A and 25B refer.	S.7(3) and 40 refer. The	S.43 refers. The landlord	S.29 refers. Similar to	S.12(2) proscription above	S.70 refers. No reference	S.18(5) refers. The	S.35 and 36 refer - similar

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<p>Allowable, subject to contributions being limited to 5% of landlord's outgoing for a year and to there being no contributions allowed where fund is in credit of more than \$250,000. Any credit balance of a sinking fund must be placed into an interest bearing account. The landlord cannot use the sinking fund or any interest paid on the sinking fund for any purpose other than major items of repair and maintenance.</p> <p>A landlord is liable to contribute any deficiency to a sinking fund for major items of repair or maintenance that arise from any failure by landlord or a predecessor in title to apply amounts in the fund only for the purpose for which the fund was established.</p> <p>The landlord must (within 3 months after the end of each accounting period) provide an expenditure statement and auditor's report.</p>	<p>landlord cannot recover from the tenant as outgoing the landlord's contribution to a depreciation or sinking fund.</p> <p>The tenant can be required to make separate contributions to fund ("maintenance amounts").</p> <p>The landlord must pay maintenance amounts from the tenant into an interest bearing account.</p> <p>The landlord may apply amounts standing to the credit of the sinking fund and interest earned on it for major maintenance of or repairs to, the building plant and equipment of, and the areas used in association with the shopping centre or the building and plant or equipment of the building, or the leased shop and the plant or equipment of the leased shop.</p> <p>The landlord must pay any deficiency attributable to a failure by the landlord or predecessor in title to comply with the requirement to only apply amounts standing to be credited to the sinking fund and interest earned. Total payments contributions by a tenant for any year must not exceed 5% of the landlord's total of the estimated outgoing for the retail shops for the year.</p>	<p>cannot recover from tenant as outgoing, any contribution to a sinking fund to provide for capital works.</p>	<p>NSW.</p> <p>However, S.29 does not limit contributions to 5% of the landlord's estimated outgoing. No reference to no contributions where fund over \$250K.</p>	<p>concerning RSC capital costs applies.</p> <p>S.12A also refers, and applies to any retail shop lease.</p> <ul style="list-style-type: none"> <li>The purpose of the sinking fund must be specified in the lease.</li> <li>The landlord may only apply the sinking fund to the specified purpose and to taxes and imposts on the fund, the cost of an end of accounting year audit by a registered company auditor and accountant.</li> <li>The fund must be paid into 1 or more appropriately designated interest bearing accounts held by the landlord with a bank in WA.</li> <li>Full and accurate accounts and records must be kept.</li> <li>At the end of each accounting year the accounts must be audited by an auditor who is a registered company auditor within the meaning of the Corporations Act.</li> <li>A copy of the auditor's report must be distributed to the tenant within 3 months after the end of the relevant accounting period.</li> <li>If a tenant, within 3 years after the tenant receives the copy of the report referred to above, notifies the landlord that there is a</li> </ul>	<p>to sinking fund but the tenant can only be liable for "recoverable outgoing".</p> <p>Recoverable outgoing means outgoing recoverable under S.70.</p>	<p>landlord may establish a sinking fund (defined in S.1) for major items of repair and maintenance, but the funds recovered from tenants must be paid into a separate account and only utilised for those purposes specified in the lease.</p> <p>Under S.18(2)(b), the landlord cannot recover from the tenant any contribution by the landlord to a sinking fund.</p>	<p>to NSW.</p> <p>The limitations of S.35 are deemed to be included in a lease.</p>

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				<p>deficiency in the fund due to any non compliance of the foregoing obligations by the landlord (or by any predecessor of the landlord) then the landlord is liable for the deficiency.</p> <p>S.12A sets no limit on the level of contribution that may be recovered from a tenant (ie whether by way or a % of the landlord's estimated operating expenses or by freezing payments if the accumulated fund exceeds a stipulated dollar figure).</p>			
<b>LAND TAX</b>							
S.26 refers. There is a limit on recovery of land tax according to its recovery on a single holding basis only.	S.7(3)(a) refers. The landlord cannot recover land tax from the tenant.	S.50 refers. From 1 July 2003, the landlord cannot recover land tax from the tenant.	S.30 refers. Not recoverable.	S.12 refers. Similar to NSW.	S.70 refers. Recoverable outgoings can include land tax (by definition). No special provisions in land tax legislation for multiple holdings nor threshold amounts.	S.18 refers. Outgoings can include land tax.	There is no land tax in the Northern Territory.
<b>ESTIMATES OF OUTGOINGS</b>							
<p>S.27 refers. The landlord must provide in writing:</p> <ul style="list-style-type: none"> <li>estimates of outgoings (once during each accounting period); and</li> <li>an outgoings statement and auditor's report (within 3 months after the end of each accounting period).</li> </ul> <p>A retail shop lease is taken to include:</p> <ul style="list-style-type: none"> <li>a written estimate of the outgoings;</li> </ul>	<p>SS.37(2)(b) and (c) and 37(6) refer. If the tenant is required to pay all or part of the landlord's outgoings, the landlord must furnish to tenant an:</p> <ul style="list-style-type: none"> <li>annual estimate 1 month before the start of the period to which the estimate relates or before the tenant enters into the lease; and</li> <li>an audited annual statement 3 months after the end of the period to which the outgoings relate.</li> </ul>	<p>SS.46 and 47 refer. The landlord must furnish to the tenant:</p> <ul style="list-style-type: none"> <li>an annual estimate 1 month before the beginning of each accounting period and when the tenant enters into the lease. The tenant is not liable to contribute to outgoings until the tenant is given that estimate; and</li> <li>a statement of actual expenditure to be given once during each accounting period and</li> </ul>	<p>SS.31 and 32 refer. The landlord must give to tenant before the lease is entered into and 1 month prior to each accounting period, a written statement setting out estimates as to the tenant's liability and an auditor's report within 3 months of each accounting period.</p>	<p>S.12 refers. Where under a retail shop lease a tenant is required to pay operating expenses, the lease is deemed to provide that the tenant is not required to pay and the landlord cannot recover from the tenant any operating expenses in respect of a year or any part of the year until at least 1 month after the landlord has given to the tenant annual estimates of expenditure under each item of operating expenses payable by the tenant in respect of</p>	<p>S.65 refers. A lease providing for the payment of outgoings by the tenant must include a provision requiring the landlord to:</p> <ul style="list-style-type: none"> <li>give the tenant a written estimate of the outgoings at least 1 month before the start of each accounting period; and</li> <li>make a written expenditure statement available for examination by the tenant within 1 month after the end of the</li> </ul>	<p>S.S.18(6) and 19 refer. The Code does not require regular financial statements to be given by the landlord regarding outgoings as a prerequisite to the tenant's liability. The tenant may request in writing a detailed estimate of outgoings at least 1 month prior to the commencement of an accounting year and may also request a statement showing the actual expenditure on outgoings.</p> <p>The tenant may request that</p>	<p>S.39 refers. The provisions of S.39 are similar to those of NSW with the exception of the provisions relating to management fees and cleaning costs for RSCs.</p> <p>Where outgoings are recoverable under the lease, S.39 provisions are deemed to be included in the lease.</p>

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<ul style="list-style-type: none"> <li>the above estimate must be given to the tenant every accounting period of the landlord; and</li> <li>if the shop is in a RSC, the estimate should include a statement of management fees and cleaning costs.</li> </ul>		3 months after the end of each accounting period.		the year.	<p>accounting period that the statement relates to.</p> <p>Both the estimate and the statement must itemise the outgoings using the same item descriptions used in the DS. The statement must also contain details of expenditure by the landlord for outgoings to which the tenant contributes.</p>	the landlord provide an audited report of outgoings for any accounting year. However if the landlord's statement is found by the auditor to be at least 95% accurate, then the tenant is liable for the cost of the audit.	
<b>OUTGOINGS STATEMENT AND AUDITOR'S REPORT</b>							
<p>SS.28 and 28A refer. The outgoings statement must detail all expenditure by a landlord (to which the tenant is required to contribute) in each accounting period and must be given to the tenant within 3 months of the end of the accounting period to which it relates. If the shop is in a RSC, the statement must include details of the gross lettable area and details of any material change in that gross lettable area to which the statement relates. If shop is in a RSC, the outgoings statement is to include:</p> <ul style="list-style-type: none"> <li>statement of total management fees;</li> <li>statement of total cleaning costs; and</li> <li>any other particulars.</li> </ul> <p>It must be prepared in accordance with accounting standards and is to be accompanied by the auditor's report which is to be prepared by a registered company auditor. The</p>	<p>S.37(5) refers. An auditor registered under the Corporations Act must prepare an audited annual statement in accordance with the Act.</p> <p>The statement must contain things such as:</p> <ul style="list-style-type: none"> <li>the auditor's opinion on whether the statement accurately reflects the landlord's outgoings;</li> <li>a comparison between the estimate and the amount actually spent by the landlord; and</li> <li>a comparison between the total amount spent and the amount paid by the tenant.</li> </ul>	<p>S.47 refers. The outgoing statement must be prepared in accordance with the AASB and the year end statement must be accompanied by a report prepared by a registered company auditor that states whether:</p> <ul style="list-style-type: none"> <li>the statement correctly states the landlord's expenditure and each individual outgoing that comprises more than the prescribed percentage of the total amount of outgoings to which the tenant is liable to contribute; and</li> <li>the total amount that the estimated outgoings for that period exceeded the total actual expenditure.</li> </ul> <p>Outgoings statements are not required to be provided where council rates, insurance and the like are the only recoverable outgoings provided receipts of such outgoings are</p>	<p>S.32 refers. Similar to NSW. However, the auditor's report must include a statement as to whether or not the amounts paid by the tenant for outgoings were properly payable. The report does not need to be audited where the tenant is only liable to payment of council rates, water and sewerage rates and insurance premiums provided receipts are provided with the report.</p>	<p>S.12 refers. Within 3 months after the end of an "accounting year" (being a financial year unless otherwise specified in the lease) the landlord must give the tenant an "operating expenses statement".</p> <p>An operating expenses statement in respect of a retail shop in a RSC must detail the total lettable area (current and any material changes during the accounting period).</p> <p>An operating expenses statement in respect of any retail shop lease:</p> <ul style="list-style-type: none"> <li>Must be prepared in accordance with applicable accounting standards made by the AASB.</li> <li>May be a composite statement relating to more than 1 tenant, as long as a tenant can ascertain the required information relevant to it.</li> </ul>	<p>S.66 refers. A lease providing for the payment by the tenant of outgoings must include a provision requiring the landlord to give the tenant a written report within 3 months after the end of the relevant accounting period.</p> <p>Subject to subsection 66(4), the report must:</p> <ul style="list-style-type: none"> <li>be prepared by an auditor on a cash accounting basis (unless the DS or lease provides for another accounting method) to be used;</li> <li>contain details of the landlord's spending on outgoings that the tenant contributed to in the accounting period; and</li> <li>include a statement by the auditor about whether or not: <ul style="list-style-type: none"> <li>the outgoings were recoverable outgoings; and</li> <li>the outgoings the tenant contributed</li> </ul> </li> </ul>	<p>S.19 refers. A tenant may request a landlord to provide an audited report of outgoings for any "accounting year" (being an accounting year as set out in a lease or if not set out, a financial year). If requested a landlord is to provide a report within 3 months of the end of each accounting year.</p> <p>A report is to contain a statement, prepared in accordance with recognised accounting principles showing:</p> <ul style="list-style-type: none"> <li>whether the landlord's outgoings have been properly charged;</li> <li>the manner in which they have been expended; and</li> <li>whether the outgoings recoverable from the tenant exceed the amount incurred by the landlord.</li> </ul> <p>If the landlord's statement is found by the auditor to be at least 95% accurate, the</p>	<p>S.40 refers. The provisions are similar to those of NSW with the exception of the provision requiring RSCs to provide specifics of management fees and cleaning costs. The provision of an auditor's report can be avoided if the outgoings statement only relates to water, sewerage and drainage rates, council rates and insurance premiums, and the landlord's statement is accompanied by copies of all assessments, invoices, receipts or other proofs of payment of those outgoings.</p>

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<p>report must include a written statement by the auditor as to whether:</p> <ul style="list-style-type: none"> <li>the outgoing statement correctly states the landlord's expenditure; and</li> <li>estimated outgoing exceed actual outgoing.</li> </ul> <p>Along with insurance, strata levies should be included in the outgoing statement, provided they relate to the statement.</p> <p>A tenant is to be given a reasonable opportunity to make a written submission to the auditor about the accuracy of the landlord's outgoing statement.</p> <p>A tenant is entitled to withhold payment of contributions for outgoing in certain circumstances.</p>		given.		<ul style="list-style-type: none"> <li>(Unless the statement relates to only certain rates, taxes and relevant authority payments and insurance costs) must be accompanied by a report on the statement prepared by a registered company auditor within the meaning of the Corporations Act stating whether the operating expenses statement correctly states the expenditure and also whether the estimated operating expense exceeded the actual expenditure.</li> </ul> <p>The landlord must pay ½ the audit costs.</p>	<p>to was more than the amount spent by the landlord in the accounting period.</p> <p>Under subsection 66(4), the report need not be prepared by an auditor (nor contain the auditor's statement) if the outgoing only relate to rates, other statutory charges; insurance and/or certain contributions under the Unit Titles Act 2001. A majority of tenants in a retail shopping centre may waive the requirement for an auditor's report (S.72 refers).</p>	tenant is liable for the cost of the audit.	
<b>ADJUSTMENT OF CONTRIBUTIONS TO OUTGOINGS</b>							
<p>S.29 refers. Requirement for adjustment of contributions to outgoing based on actual expenditure properly and reasonably incurred.</p> <p>The adjustment is to take place within 1 month after the landlord gives the tenant the outgoing statement and within 4 months after the end of the period referred to in the outgoing statement.</p>	No mention in the Act.	S.48 refers. Requirement for adjustment of contributions to outgoing based on actual expenditure properly and reasonably incurred. Any adjustment is to take place within 1 month after the landlord gives the tenant the outgoing statement or within 4 months after the end of the accounting period, whichever is the earlier.	S.33 refers. Similar to NSW except adjustment to take place within 3 months after the end of each accounting period.	S.12 refers. There is no time period provided by the Act within which any necessary adjustments must take place after the operating expenses statement is provided.	S.67 refers. If a lease requires the tenant to contribute to outgoing, the lease must include a provision to the effect that, within 3 months of the end of each payment period, there must be an adjustment for any underpayment or overpayment by the tenant in relation to the outgoing (on the basis of estimated expenditure versus actual expenditure reasonably and properly incurred by the landlord).	No mention in the Code as to adjustment.	S.41 refers. Similar to NSW.

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<b>LIMITATION OF NON-SPECIFIC OUTGOINGS CONTRIBUTION</b>							
S.30 refers. Limited to the ratio of lettable area of shop to total lettable areas of all shops in the RSC to which the outgoing is referable. An outgoing on account of GST payable by the landlord in respect of rent payable under a lease is not a non-specific outgoing of the landlord for the purposes of this section.	S.38 refers. Limited to the ratio that area of leased shop bears to the total area of all premises leased or occupied or available for lease or occupation (whether or not retail shops) who share or would share the benefits of such outgoings.	S.39(2) and Regulation 5 refer. Limited to the ratio that the lettable area of the retail premises bears to the total of the lettable areas of all the retail premises which receive the benefit of the outgoing.	S.34 refers. Similar to NSW.  A tenant is not liable to contribute to an outgoing not specifically referable to any particular shop in a centre unless the shop is one of the shops to which the outgoing is referable.	S.12 refers, similar to NSW but without the GST provision.  As noted above, a tenant under a retail shop lease of premises in a "group of premises": <ul style="list-style-type: none"> <li>is not required to contribute to any operating expense that is not "referable" to the tenant's shop; or</li> <li>where an operating expense is "referable" to the tenant's shop as well as other premises in the group, cannot be required to pay more than the ratio of lettable area of the shop to total lettable areas of all premises in the group of premises to which the outgoing is "referable".</li> </ul> "Referable" is defined to mean a retail shop enjoys or shares the benefit of the expense.	S.70 refers. Recoverable outgoings for premises located in the retail area of a shopping centre must be a reasonable expense directly related to the operation, or a reasonable expense, of repairing or maintaining an area used for or in connection with the retail area of the shopping centre that contains the premises.	S.18(3) refers. The proportion of outgoings to be paid by a tenant is calculated as: <ul style="list-style-type: none"> <li>the ratio of the lettable area of the tenant's premises to the lettable area of all lettable premises sharing the benefit of a particular outgoing; or</li> <li>the ratio of the assessed annual value of the tenant's premises to the assessed annual value of all lettable premises sharing the benefit of a particular outgoing.</li> </ul>	S.42 refers. In order for the outgoing to be recoverable, the premises must be one of a group of shops for which the outgoing is referable, and the amount recoverable is limited to the ratio that the lettable area of the premises bears to the total lettable area of all premises to which the outgoing is referable.
<b>REVIEW OF CURRENT MARKET RENT</b>							
S.31 Refers. This section relates to retail shop leases which provide an option to renew or extend the lease with rent reviewed to CMR.  If the landlord and tenant do not reach agreement about what the CMR	SS. 28 - 36A refer. Please see Market Rent Reviews.	S.37 refers. Please see Market Rent Reviews.	S.35 refers. Similar to NSW, but valuer appointed by President of API.	S.11 applies to every market review specified under the retail shop lease. See above for discussion.	SS.52, 53, 54, 55, 57, 58, and 59 refer. Please see Market Rent Reviews.	No provision in Code for review of current rent, on application.  See notes below re S.20, when lease provides for review.	S. 29 refers. Please see Market Rent Reviews.



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<p>should be, the amount of rent is to be determined by valuation by a SRV appointed by agreement of the parties, or failing agreement, by the Tribunal.</p> <p>A party to a retail shop lease can also apply to the NSW SAT for the appointment of a SRV. A party to a lease may make written submissions to a SRV to assist in his considerations.</p> <p>A SRV must make a valuation of a CMR within 1 month after receiving the information it has requested of the landlord (such as current rental, outgoings, incentives and variations of the lease) referred to in subsection (1)(d).</p>							
<b>EARLY REVIEW OF CURRENT MARKET RENT</b>							
<p>SS.32 and 32A refer. A tenant is entitled to have CMR determined 3 to 6 months prior to the last day on which an option may be exercised. If a tenant so elects, the period within which the tenant must exercise the option is varied, so that the option must be exercised by the earlier of the last day of the term or 21 days after the rent is determined.</p> <p>A party to a lease may apply to the NSW SAT (within 21 days) for the appointment of 2 SRVs to conduct a review of a</p>	<p>S.27A refers. Where rent on the exercise of an option is reviewed to CMR, the tenant may request the CMR be determined 3 to 6 months (for a lease greater than 1 year) or one to 3 months (for a lease for 1 year or less) prior to the last day on which an option may be exercised. If a tenant so elects, the period within which the tenant must exercise the option is varied, so that the option must be exercised by the earlier of the last day of the term or 21 days after the rent is determined.</p>	<p>No mention in the Act.</p>	<p>S.36 refers. Similar to NSW except the CMR is to be determined 2 to 6 months prior to last day on which the option may be exercised.</p> <p>(Note: If the term of the lease is 12 months or less, the above periods are shortened to 3 months and 30 days.)</p>	<p>S.11 applies on every market review specified under the retail shop lease.</p> <p>There is no specific separate provision in relation to a market review falling on the commencement date of an option term under the lease.</p> <p>In particular there is no ability for the tenant to have the CMR determined early .</p>	<p>No provision for early review.</p>	<p>S.20 refers. No provisions for <b>early</b> review. If an option is to be exercised at CMR, the tenant, no less than 4 months or more than 6 months before the expiry of the period to exercise the option, may request the landlord to state the proposed rent to apply from the commencement of the new term. The landlord is to then give notice of the amount of the proposed rent not less than 3 months before the expiry of the period to exercise the option. Within 30 days after receiving the landlord's notice, the tenant</p>	<p>S.30 refers - similar to S.32 of the NSW Act. No referral to SRV.</p>

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<p>determination of the CMR. The determination is to be made no later than 1 month after notification.</p> <p>The party who applied for the appointment of the SRV is to bear the costs if the CMR is jointly determined by the SRVs to be the same as or within 10% of the amount specified in the determination. Otherwise, the parties are to pay the costs of the review in equal shares.</p>						<p>must notify the landlord that the tenant:</p> <ul style="list-style-type: none"> <li>exercises the option at the rent proposed; or</li> <li>does not agree with the rent proposed but wishes to negotiate an amount;</li> <li>requires the rent to be determined in accordance with the market review procedure under S. 21.</li> </ul>	
<b>COMPENSATION FOR DISTURBANCE</b>							
<p>S.34 refers. A lease is taken to provide for compensation to the tenant in respect to certain disturbances if the landlord:</p> <ul style="list-style-type: none"> <li>inhibits access to the shop in a substantial manner; or</li> <li>takes action that would alter substantially the flow of customers; or</li> <li>unreasonably takes action that causes significant disruption of trading; or</li> <li>fails to take reasonable steps to prevent disruption; or</li> <li>fails to rectify the breakdown of plant and equipment; or</li> <li>fails to adequately clean, maintain or repair common areas of a RSC.</li> </ul> <p>A retail lease may include a provision preventing or limiting a claim for</p>	No mention in Act.	<p>S.54 refers. Similar to NSW.</p> <p>Note also landlord must maintain in a condition consistent with the condition of the premises when the retail premises lease was entered into:</p> <ul style="list-style-type: none"> <li>the structure of and fixtures in the premises;</li> <li>plant and equipment at the premises; and</li> <li>appliances, fittings and fixtures provided by the landlord relating to services,</li> </ul> <p>except if:</p> <ul style="list-style-type: none"> <li>the need for repair arises out of misuse by tenant; or</li> <li>the tenant is entitled or required to remove the item at the end of the lease. (S.52 refers).</li> </ul>	<p>S.38 refers. Similar to NSW except that no specified particulars of the disturbance are required under S.38.</p> <p>A disclosure statement under S.12 is an appropriate means of specifically drawing the attention of the tenant to the likelihood of the occurrence of the disturbance.</p>	<p>In relation to a retail shop in a RSC, S.14 contains similar compensation rights to the NSW provisions except that:</p> <ul style="list-style-type: none"> <li>the circumstances giving rise to the right to claim compensation are not identical;</li> <li>before the right arises the tenant must give the landlord written notice of the matter requiring the landlord to rectify the matter and the landlord does not do so within such time as is reasonably practicable;</li> <li>giving a written statement to the tenant before the lease was entered into which included certain details regarding disturbance does not necessarily prevent or limit a claim (depending on all of the circumstances).</li> </ul>	<p>SS.81 and 82 refer. Landlord is liable to pay the tenant reasonable compensation for loss or damage (other than nominal loss or damage) suffered by the tenant if the landlord adversely affects the trade of the tenant by the landlord's conduct without reasonable cause, whether by act or omission.</p> <p>E.g., if landlord:</p> <ul style="list-style-type: none"> <li>materially inhibits access by the tenant to the premises; or</li> <li>takes action that would materially inhibit or alter the flow of customers to the premises; or</li> <li>fails to fix a breakdown of plant or equipment under the lessor's care and maintenance as soon as practicable; or</li> <li>for premises located in the retail area of a shopping centre, does</li> </ul>	<p>S.23(1) refers. Similar to NSW.</p> <p>The landlord must compensate the tenant if it acts as stated (equivalent to SS.23(1)(a) to (d) and (g) in the Code).</p> <p>Additional basis for compensation provided in S.23(1)(e), (f) and (h) to (k), namely if the landlord:</p> <ul style="list-style-type: none"> <li>"acts in a manner which, in all the circumstances is unconscionable" (S.23(1)(e));</li> <li>terminates a lease dishonestly, maliciously, or for a non-genuine purpose (S.23(1)(f));</li> <li>fails to take reasonable steps to ensure the premises are kept in good order and repair (S.23(1)(h));</li> <li>relocates the tenant's business (section</li> </ul>	<p>S.47 refers. The landlord is liable to compensate the tenant if it does not rectify any of the following matters as soon as reasonably practicable after receiving notice from the tenant:</p> <ul style="list-style-type: none"> <li>inhibits access of the tenant to the shop in a substantial manner;</li> <li>takes an action that would inhibit or alter, to a substantial extent, the flow of customers to the shop;</li> <li>unreasonably takes an action that causes significant disruption of, or has a significant adverse effect on, trading of the tenant in the shop (applying the shopping centre management practices);</li> <li>fails to take all reasonable steps to prevent or put a stop to anything that causes</li> </ul>

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compensation if a written statement was given to the tenant before the lease was entered into and the statement included certain details regarding disturbance.					<p>not adequately clean, maintain or repair the shopping centre (including common areas).</p> <p>In working out reasonable compensation for S.81, any concession given to the tenant (for example, reduced rent) based on the disturbance, or likelihood of disturbance, of the tenant's trade must be taken into account.</p>	<p>23(1)(i));</p> <ul style="list-style-type: none"> <li>fails to take reasonable steps to ensure that any defect in the shopping centre or premises is rectified (S.23(1)(j));</li> <li>causes the tenant to vacate before the end of the lease because of extensions/ refurbishment or demolition (S.23(1)(k)).</li> </ul> <p>Similar to NSW: the lease can limit liability for compensation in circumstances referred to in SS.23(1)(a), (b), (c), (d), and (g) above <b>only</b> if:</p> <ul style="list-style-type: none"> <li>before execution of lease, specific disturbance is brought to tenant's attention by landlord; and</li> <li>the lease contains a specific clause providing a formula for compensation in the event of specific disturbance referred to.</li> </ul> <p>No limitation of liability for compensation in circumstances referred to in SS.23(1)(e) or (f) permitted.</p>	<p>significant disruption of, or which has a significant adverse effect on, trading of the tenant in the shop and that is attributable to causes within the landlord's control;</p> <ul style="list-style-type: none"> <li>fails to rectify a breakdown of plant or equipment under the landlord's care or maintenance; or</li> <li>fails to adequately clean, maintain or repair the retail shopping centre, including common area.</li> </ul>
<b>RELOCATION</b>							
<p>S.34A refers. Certain provisions in the event of a relocation clause are implied as being included in a lease. The tenant cannot be required to be relocated unless:</p> <ul style="list-style-type: none"> <li>details of a genuine proposed refurbishment,</li> </ul>	<p>SS.43(1)(a), 43(2), 44(1), 44(2) and 46C refer. There is an implied provision in every lease that a landlord must pay reasonable compensation for loss suffered if the landlord relocates the tenant's business. Any provision excluding compensation is</p>	<p>S.55 refers. Similar to NSW.</p>	<p>S.57 refers. Similar to NSW however offer of new lease is on the same terms and conditions as the existing lease (excluding rent).</p> <p>(The section sets out minimum entitlements of the tenant. The section</p>	<p>S.14A of the amending Act refers. Previously there were no specific provisions addressing relocation, and S.13 applied together with practices set by SAT from time to time.</p> <p>S.14 renders <b>void</b> a relocation provision</p>	<p>SS.136, 137 and 138 refer. A provision in a lease allowing relocation of the tenant must require the landlord to:</p> <ul style="list-style-type: none"> <li>give the tenant at least 3 months' written notice; and</li> <li>offer to provide</li> </ul>	<p>S.35 refers. Certain provisions in the event of a relocation are implied in a lease. The tenant cannot be required to be relocated unless the tenant is presented with plans for refurbishment, redevelopment or extension of the shopping centre</p>	<p>S.48 refers - similar to NSW.</p>

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<p>redevelopment or extension have been provided;</p> <ul style="list-style-type: none"> <li>the landlord has given at least 3 months' written notice of relocation and the notice gives details of an alternative shop to be made available; and</li> <li>the tenant has received an offer of a new lease of an alternative shop on the same terms and conditions for the remainder of the term of the existing lease (with the subject rent being adjusted to take into account differences in the commercial values of the existing retail shop and the alternative shop at the time of relocation).</li> </ul> <p>The tenant is then entitled to terminate the lease within 1 month of receiving the relocation notice. In this event, the lease terminates 3 months after the relocation notice is given. The landlord is to pay the tenant's reasonable costs of the relocation (including dismantling and re-installing of fixtures and fittings and legal costs).</p> <p>If the tenant does not give a notice of termination, the tenant is taken to have accepted the offer of an alternative lease as offered.</p> <p>The tenant is entitled to payment by the landlord of</p>	<p>void.</p> <p>The tenant is entitled to payment by the landlord for its reasonable costs of relocation under S.46G.</p> <p>The landlord must give at least 3 months' written notice of the relocation and includes details as to the premises to which the tenant will be relocated.</p> <p>The landlord's right to relocate the tenant under SS.46D to 46G is taken to be included in the lease if the lease includes the statement in S.46C.</p>		<p>does not prevent the tenant from accepting other arrangements offered by the landlord when details of relocation are being negotiated.)</p>	<p>included in a retail shop lease unless that provision is either:</p> <ul style="list-style-type: none"> <li>in the prescribed form; or</li> <li>approved by SAT; or</li> <li>complies with S.14(2) if at least 5 years of the term of the lease (including any extended period under an option to renew) has expired.</li> </ul> <p>S.14(2) sets the following minimum requirements for the above purpose:</p> <ul style="list-style-type: none"> <li>a minimum 6 months relocation notice must be given to the tenant by the landlord; and</li> <li>the relocation notice must include details of the alternative premises;</li> <li>the tenant must be offered a new lease of those alternative premises on the same or better terms and conditions for at least the remainder of the term of the current lease and the rent is to be no more than the rent of the existing premises adjusted to take into account any difference in commercial values of the existing shop and the alternative shop at the time of the relocation;</li> <li>the landlord must pay the tenant's reasonable costs of relocation - including but not</li> </ul>	<p>alternative comparable premises for a period equivalent to the unexpired term of the lease on terms no less favourable than the original lease.</p> <p>Comparable premises include premises that have not yet been built.</p> <p>The tenant may give written notice to the landlord (within 1 month after receiving a relocation notice) of the tenant's intention to terminate. If the tenant does elect to terminate, termination takes effect 3 months after the relocation notice was received unless otherwise agreed by the parties.</p> <p>The landlord must pay the tenant's reasonable costs of relocation and pay reasonable compensation to the tenant for any other loss or damage incurred because of the relocation.</p> <p>S.137 refers. A provision in a lease that allows the tenant to be relocated other than so the landlord can repair, refurbish, redevelop or extend a shopping centre is void.</p> <p>S.138 refers. The landlord must not use a provision of a lease that allows relocation of the tenant within a shopping centre because of proposed</p>	<p>showing that:</p> <ul style="list-style-type: none"> <li>a genuine proposal is to be carried out within a reasonably practicable time after relocation of the tenant; and</li> <li>the proposal cannot be carried out practicably without vacant possession of the tenant's premises.</li> </ul> <p>The landlord must give the tenant at least 6 months' written notice of the date for relocation including an offer of alternative premises and the terms and conditions on which they are offered.</p> <p>The tenant must be compensated for actual reduction in, or loss of, profit during relocation from the point of closure to the point of opening.</p> <p>The tenant can remain at the existing premises unless the tenant is satisfied that:</p> <ul style="list-style-type: none"> <li>the new premises are equivalent to the existing premises; or</li> <li>the tenant will be returned to his existing premises within a mutually agreed time.</li> </ul> <p>The area and configuration of the new premises is to be materially the same as the existing premises unless agreed otherwise by the tenant.</p> <p>The tenant may terminate the lease if alternative premises or the terms or</p>	

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<p>the tenant's reasonable costs of the relocation.</p> <p>If landlord and tenant cannot agree on what is a reasonable amount of costs, the amount is to be determined by a quantity surveyor.</p>				<p>limited to:</p> <ul style="list-style-type: none"> <li>- costs incurred by the tenant in dismantling fittings, equipment or services;</li> <li>- costs incurred by the tenant in replacing, re-installing or modifying finishes, fittings or equipment or services to the standard existing in the existing retail shop immediately before the relocation (but only to the extent reasonably required to the alternative shop);</li> <li>- packaging and removal costs incurred by the tenant;</li> <li>- legal costs incurred by the tenant; and</li> <li>- if the landlord does not offer the tenant a new lease of an alternative retail shop then the landlord is liable to pay to the tenant such reasonable compensation as is agreed in writing between the parties, or determined by SAT.</li> </ul> <p>Under S.14(3) SAT can, on application to it by the landlord (notice of which has been given to the tenant), approve a different relocation provision if SAT</p>	<p>repairs, refurbishment, redevelopment or extension unless:</p> <ul style="list-style-type: none"> <li>• the proposed repairs, refurbishment, redevelopment or extension cannot practicably be carried out without vacant possession of the premises; and</li> <li>• the landlord presents the tenant with a plan for the repairs, refurbishment, redevelopment or extension.</li> </ul> <p>The proposed repairs, refurbishment, redevelopment or extension must be carried out within a reasonable time after the relocation of the tenant.</p> <p>The relocation provisions of the Act only apply to leases for premises in the retail areas of shopping centres (see S.128).</p>	<p>conditions of the lease of those premises are not acceptable.</p> <p>The new lease is to be on the same terms as the existing lease except as to rent which unless otherwise agreed is to be the CMR.</p> <p>The landlord is to pay the tenant's reasonable costs of relocation.</p> <p>Similar to NSW, the lease is to provide that the landlord is to pay the tenant's reasonable costs of relocation.</p> <p>No similar provision regarding determining reasonable amount.</p>	

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				is satisfied that special circumstances exist by reason of which approval ought to be given.			
<b>DEMOLITION</b>							
<p>S. 35 refers. If a lease provides for termination on the grounds of proposed demolition of the building, the lease cannot be terminated, unless the landlord has:</p> <ul style="list-style-type: none"> <li>provided the tenant with sufficient details of the proposed demolition to indicate a genuine proposal to demolish the building, within a reasonably practicable time after termination; and</li> <li>provided at least 6 months written notice of termination.</li> </ul> <p>If such notice is given to the lessee, the tenant may terminate the lease by giving the landlord 7 days written notice within 6 months before the termination date given by the landlord. If the lease is for 12 months or less, the notice period is shortened from 6 months to 3 months.</p> <p>If the demolition does not occur within a reasonable time after the termination date, the landlord may be liable to pay compensation to the tenant for damages.</p> <p>If the tenant was required under the lease to fit out the shop, the landlord is liable to pay compensation to the</p>	<p>SS.46H to 46K refer. The Act implies these provisions into leases which include a right to terminate the lease for demolition(as noted in S.46H).</p> <p>These provisions (SS.46I to 46K) limit the landlord's right to terminate the lease for demolition by requiring a genuine proposal to demolish the building with sufficient details to be provided to the tenant. At least 6 months' notice must be given and the tenant may elect for an earlier termination. The Act provides for compensation to be paid to the tenant for its fitout, and where the demolition does not proceed, for any loss suffered by the tenant. However the compensation rights for loss and damage if the demolition is not carried do not apply if the landlord can prove that as at the date of the landlord's notice, the landlord had a genuine proposal to demolish the building within a reasonable time after the termination date.</p>	<p>S. 56 refers. A retail premises lease that provides for termination of the lease on the ground of proposed demolition of the building in which the retail premises are located is taken to provide the following:</p> <p>The landlord cannot terminate the lease on that ground unless the landlord has:</p> <ul style="list-style-type: none"> <li>provided the tenant with details of the proposed demolition that are sufficient to indicate a genuine proposal to demolish the building within a reasonably practicable time after the lease is to be terminated; and</li> <li>given the tenant at least 6 months' written notice of the termination date. (subsection 2)</li> </ul> <p>If the landlord gives the tenant a notice of termination in accordance with subsection (2), the tenant may terminate the lease before the termination date by giving the landlord not less than 7 days' written notice (subsection 3).</p> <p>If the lease is terminated by the landlord in accordance with subsection (2), or by the tenant in accordance</p>	<p>SS.3 and 39 refer. Demolition of a building of which a retail shop forms part includes a substantial repair, renovation or reconstruction of the building which cannot be carried out practicably without vacant possession of the premises.</p> <p>The landlord is only entitled to terminate a lease on the grounds of a proposed demolition of the building of which the retail shop forms part if the lease contains a provision to that effect.</p> <p>If termination on the grounds of demolition is provided for in the lease, the lease is taken to include the following provisions:</p> <ul style="list-style-type: none"> <li>the lease cannot be terminated on the grounds of demolition unless and until the landlord has provided the tenant 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;</li> <li>the lease cannot be terminated by the landlord without at least 6 months written</li> </ul>	<p>There is no provision in the WA Act specifically addressing termination of a retail shop lease to allow a demolition.</p> <p>S.13 and S.14 apply - see above for the detailed discussion concerning landlord's early termination rights in WA, as regulated by the Act.</p>	<p>S. 78 refers. A lease may provide for termination because of the proposed demolition of the building containing the premises, but the lease cannot be terminated because of proposed demolition unless the landlord has:</p> <ul style="list-style-type: none"> <li>provided the tenant with sufficient details of the proposed demolition to indicate a genuine proposal to demolish the building, and</li> <li>given the prescribed period of notice (at least 3 months if term is up to 1 year, and at least 6 months in any other case).</li> </ul> <p>The landlord must pay reasonable compensation to the tenant if the lease is terminated because of the proposed demolition before the end of the term .</p>	<p>S.24 refers. For a demolition clause to be invoked, a landlord must provide to the tenant firm proposals for the demolition affecting the tenancy involved. The landlord must give the tenant at least 6 months written notice of the termination of the lease. The tenant may then terminate on 1 month's written notice which can be given to the landlord at any time within 6 months before the termination date specified by the landlord.</p>	<p>S.49 refers. Demolition is defined as substantial repair, renovation or reconstruction of the building that cannot be carried out practicably without vacant possession of the shop.</p> <p>If a retail shop lease provides for the termination of a lease on the grounds of the proposed demolition of the building, the following applies:</p> <ul style="list-style-type: none"> <li>the lease cannot be terminated until the landlord has provided the tenant with details of the proposed demolition which indicates a genuine proposal to demolish the building within a reasonable time after the termination;</li> <li>the lease cannot be terminated by the landlord without at least 6 months written notice; and</li> <li>if the landlord serves the notice of termination, the tenant may terminate the lease giving 7 days written notice within 6 months of the termination date notified by the landlord.</li> </ul> <p>If a lease is for 12 months or less, the period of 6</p>

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tenant (whether or not the demolition is carried out).		<p>with subsection (3), the landlord is liable to pay the tenant reasonable compensation:</p> <ul style="list-style-type: none"> <li>if the demolition of the building is not carried out, or not carried out within a reasonably practicable time after the termination date, for damage suffered by the tenant as a consequence of the early termination of the lease; and</li> <li>whether or not the demolition of the building is carried out, for the fit out of the retail premises to the extent that the fit out was not provided by the landlord (subsection 4).</li> </ul> <p>However, the landlord is not liable to pay compensation for the damage mentioned in subsection (4)(a) if the landlord establishes that when the notice was given there was a genuine proposal to demolish the premises within a reasonably practicable time after the termination date.</p> <p>The amount of the compensation is the amount that is:</p> <ul style="list-style-type: none"> <li>agreed between the landlord and the tenant; or</li> <li>if there is no agreement, determined under Part 10 of the Act (Dispute Resolution).</li> </ul>	<p>notice of the termination;</p> <ul style="list-style-type: none"> <li>if a notice of termination is given to the tenant, the tenant may terminate the lease by giving the landlord not less than 7 days written notice of termination at any time within 6 months before the termination date notified by the landlord.</li> </ul> <p>If the lease is for a term of 12 months or less, the 6 month periods are shortened to 3 months.</p> <p>If a retail shop lease is terminated on the grounds of demolition and demolition of the building is not carried out within a reasonably practicable time after the termination date, the landlord is liable to pay the tenant reasonable compensation or damage suffered by the tenant as a consequence of the early termination of the lease, unless the landlord establishes that at the time of notice of termination was given by the landlord there was a genuine proposal to demolish the premises within that time.</p>				<p>months referred to above is shortened to 3 months.</p> <p>Unless the landlord can prove it provided a genuine proposal to demolish the premises, the landlord is liable to pay the tenant compensation for damage suffered as a consequence of the early termination if</p> <ul style="list-style-type: none"> <li>a retail shop lease is terminated on the grounds of the proposed demolition of the building; and</li> <li>the demolition of the building is not carried out within a reasonable time after the termination date notified.</li> </ul> <p>If a retail shop lease is terminated, the landlord is liable to pay the tenant compensation for the fit-out if the tenant is required under the lease to fit out the retail shop regardless of whether the demolition of the building is carried out or not.</p>



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		For the purposes of the section, "demolition" of the building in which retail premises are located includes any substantial repair, renovation or reconstruction of the building that cannot practicably be carried out without vacant possession of the premises.					
<b>ASSIGNMENT OF LEASE</b>							
<p>SS.39, 41 and 41A refer. S.39 provides that the landlord is only entitled to withhold consent to the assignment of a lease if the tenant proposes to change the use of the shop, the assignee has financial resources or retailing skills inferior to the assignor, the tenant does not comply with the procedure for obtaining consent under S.41 or in the circumstances set out in S.80E (which relates to a retail shop lease of airside premises at Sydney (Kingsford-Smith) Airport).</p> <p>In addition, the landlord must deal expeditiously with a request for consent. Consent is deemed to have taken place if the tenant complies with its obligations under this section and the landlord has not given notice either consenting or withholding consent within 28 days.</p> <p>S.41A provides that an assignor, guarantor or</p>	<p>SS.22B and 22C refer. A DS is required to be provided to the assignee by the landlord and by the assignee to the landlord. A financial and legal advice report must also be provided by the assignee (who is not a major tenant).</p> <p>If SS.22A-D are not complied with, a retail tenancy dispute is said to exist between the relevant parties.</p> <p>S.50 deals with retail tenancy disputes on assignment.</p> <p>S.50A provides a release of the liability of the assignor if the landlord, assignor and assignee have complied with their obligations to give DSs in S.22B and S.22C and each DS is complete and does not contain information that is false or misleading in a material particular.</p>	<p>SS.60-62 refer. The landlord is only entitled to withhold consent to an assignment of the lease if 1 or more of the following applies:</p> <ul style="list-style-type: none"> <li>the proposed assignee proposes to use the premises in a way that is not permitted under the lease;</li> <li>the assignment is in connection with a lease of retail premises that will continue to be used for the carrying on of an ongoing business and the landlord considers that the proposed assignee does not have significant financial resources or business experience to meet the obligations under the lease;</li> <li>the proposed assignor has not complied with the reasonable assignment provisions of the lease;</li> <li>the proposed assignor has not provided the</li> </ul>	<p>S.43 refers. The landlord is only entitled to withhold consent to assignment if:</p> <ul style="list-style-type: none"> <li>the assignee proposes to change use;</li> <li>the assignee is unlikely to be able to meet its financial obligations as tenant under the lease;</li> <li>the assignee's retailing skills are inferior to the assignors; or</li> <li>the tenant has not complied with procedural requirements (S.45).</li> </ul> <p>Similar to NSW regarding the landlord dealing expeditiously with a request, and consent is deemed after 42 days (S.45).</p> <p>The landlord must not seek or accept the payment of a premium in connection with the granting of consent to the assignment (S.44). However, the landlord may require payment of a reasonable sum for legal and other expenses incurred in connection with the</p>	<p>S.10 refers. The tenant under a retail shop lease has the statutory right to assign the lease, subject only to a right of the landlord to withhold consent on "reasonable grounds". The Act does not set out any grounds and the general law applies.</p> <p>Consent is deemed given by the landlord if the landlord has not given notice either consenting or withholding consent within 28 days after receiving the request to assign.</p> <p>Assignors and the assignor's guarantors under a retail shop lease are released only in regard to future obligations on the assignment.</p> <p>Any provision in a retail shop lease enabling the landlord to:</p> <ul style="list-style-type: none"> <li>withhold consent unless the assignor (or the assignor's guarantor) agrees to</li> </ul>	<p>SS.93, 94, 95 and 96 refer. Before asking for the landlord's consent to assign or sublet a lease, the tenant must give a prospective assignee or subtenant a copy of the DS and details of any material change that has happened in the information contained in the DS since the DS was given to the tenant. If the tenant does not have access to a copy of the DS, the tenant may ask the landlord to give the tenant a copy and the landlord must not (without reasonable excuse) fail to comply with that request within 14 days.</p> <p>Where the tenant has provided the DS to the proposed assignee or subtenant, the tenant may (in writing) ask the landlord to agree to the assignment, sublease or mortgage of the lease.</p> <p>Within 14 days after receiving a request to assign, sublet or mortgage, the landlord may in writing</p>	<p>S.28 refers. Landlord only entitled to reject the assignment if the proposed assignee intends to change the use of the premises, or the proposed assignee does not have the financial standing or the necessary skills to conduct the business, or the proposed assignee does not enter into a written agreement with the landlord in accordance with the terms of the lease or as otherwise reasonably required by the landlord.</p> <p>Similar to NSW, the landlord must deal expeditiously with any request to an assignment and deemed consent after 21 days.</p> <p>If, on assignment, the landlord changes the terms of the lease with the agreement of the original tenant and its guarantors, then the original tenant and its guarantors remain liable for pre-existing guarantees. However, they are released from liability if the terms of</p>	<p>S.53 refers. The landlord is only entitled to withhold its consent if:</p> <ul style="list-style-type: none"> <li>a proposed assignee proposes to change the use to which the shop is put;</li> <li>the proposed assignee does not have the financial resources or retailing skills which will enable it to fulfil its obligations under the lease; or</li> <li>the tenant has not met its obligations under the Act to provide information about the proposed assignee or a copy of an "assignor's disclosure statement".</li> </ul> <p>Under S.55 a lease is taken to include provisions obliging landlords to deal expeditiously with requests for consent and deeming the landlord to have given its consent if the tenant has met its obligations under the Act and the landlord has failed within 42 days after the request to provide its consent or withhold its</p>



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covenantor that assigns a lease of an outgoing business is released on assignment if the assignor gives a DS to the landlord and the assignee, provided the DS does not contain information that is materially false or misleading or is incomplete.		<p>proposed assignee with business records for the previous 3 years or such shorter period as the proposed assignor has carried on business at the retail premises.</p> <p>The landlord must deal expeditiously with the request for consent and is taken to have consented to the assignment if the tenant has complied with its obligations under this section and the landlord has not within 28 days after the request was made, given written notice to the tenant consenting or withholding consent.</p> <p>If the tenant gives the landlord and the proposed assignee a copy of a DS in accordance with the section and such DS does not contain any information that is false, misleading or materially incomplete, then the tenant and any guarantor is not liable to perform any obligations under the lease or to pay to the landlord any money in respect of amounts payable by the proposed assignee.</p>	<p>consent.</p> <p>(Note: S.45A sets out procedural requirements a tenant can follow to restrict liability post assignment.)</p>	<p>pay any money that is payable by the assignee under the lease; or</p> <ul style="list-style-type: none"> <li>recover from the assignor (or the assignor's guarantor) any money payable by the assignee under the lease,</li> </ul> <p>is void.</p> <p>Note above concerning a DS that no DS is required by the Act to be given on an assignment.</p> <p>Note above concerning key money that recovery is permissible from a tenant of:</p> <ul style="list-style-type: none"> <li>the landlord's reasonable expenses incurred in investigating the assignee; and</li> <li>the landlord's fair and reasonable costs of the assignment document preparation.</li> </ul>	<p>ask the tenant to provide the landlord with further information.</p> <p>If the tenant's request is for consent to an assignment or sublease, the landlord may only request any or all of the following:</p> <ul style="list-style-type: none"> <li>information about the financial standing of the prospective assignee or subtenant or the prospective guarantor;</li> <li>a certificate of occupancy for the premises;</li> <li>information about the business skills of the prospective assignee or subtenant;</li> <li>information about the proposed use of the premises by the prospective assignee or subtenant and references relating to their ability to operate the proposed business.</li> </ul> <p>If the tenant's request is for consent to a mortgage of the lease, the landlord may only request any or all of the following:</p> <ul style="list-style-type: none"> <li>information about the identity and financial standing of the proposed mortgagee;</li> <li>details of the loan or other obligation to be secured by the mortgage (including the amount of the loan, the purpose to which it is to be put, the term, the repayment schedule and the powers that</li> </ul>	a lease, other than the rent, are changed after an assignment without their agreement.	<p>consent.</p> <p>S.58 provides that an assignor, guarantor or covenantor that assigns a lease of an outgoing business is released on assignment if the assignor gives a DS to the landlord and the assignee, provided the DS does not contain information that is materially false or misleading or is incomplete.</p>

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					<p>may be exercised by the mortgagee).</p> <p>S.99 refers. Where the tenant makes a request for an assignment, sublease or mortgage of a lease, the landlord must consent or refuse to consent within:</p> <ul style="list-style-type: none"> <li>• 28 days after receiving the request; or</li> <li>• 21 days after receiving any further information requested,</li> </ul> <p>failing which consent will be deemed to have been given.</p> <p>S.100 refers. The landlord may refuse to consent to an assignment of a lease or granting of a sublease requested by a tenant only if it is reasonable to do so in all the circumstances. Refusal will be taken to be reasonable if the landlord has reasonable grounds for believing that:</p> <ul style="list-style-type: none"> <li>• the prospective assignee or subtenant intends to use the premises for a purpose not allowed under the lease or does not have the financial resources or adequate skills to run the business or they or their business will not be compatible with other tenants in the building; or</li> <li>• the tenant cannot produce a current certificate of occupancy or is in breach of the lease.</li> </ul> <p>S.102 refers. Within 6</p>		

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					months after giving or refusing consent, the landlord may recover from the tenant the reasonable costs of legal or other expenses incurred in making a decision about whether to consent to an assignment, sublease or mortgage.		
<b>TERMINATION OF LEASE</b>							
<p>S.44 and 44A refer. The landlord is required not less than 6 months or more than 12 months before the expiry of the lease to notify the tenant whether or not he will be offered a renewal or extension of the lease. The term of the lease is extended until the end of 6 months after the landlord does give such notification, if the tenant requests the 6 month extension.</p> <p>Subject to certain exceptions, during the lease, a landlord of a retail shop must not, by written or broadcast advertisement, indicate the availability of the shop for lease or invite tenders or expressions of interest for tendering (S.44A).</p>	<p>S.46AA refers. If there is no option for renewal in the lease, the landlord must by written notice either offer the tenant a renewal or extension of the lease on terms stated in the notice or tell the tenant that the landlord does not intend to offer the tenant a renewal or extension. The landlord's notice must be given:</p> <ul style="list-style-type: none"> <li>between 3 to 6 months before the existing lease expires - for a lease term of not more than 1 year; or</li> <li>between 6 months to 1 year before the existing lease expires - for a lease term of more than 1 year.</li> </ul> <p>If the landlord fails to inform the tenant whether or not it offers a renewal, the lease term is extended until 6 months after the landlord gives the notice.</p> <p>Where a lease includes an option to renew, the landlord must give the tenant between 2 and 6 months' notice of the last</p>	<p>S.64 refers. Similar to NSW if the lease contains no option for further term except that the lease will continue until 6 months after the notice is given. Whether or not the landlord has given the tenant a notice, the tenant can terminate the lease no earlier than on the expiry of the term.</p> <p>S.28 refers. Where the lease contains an option to renew, the landlord is required to notify the tenant of the date after which the option is no longer exercisable. The landlord must make this notification in writing at least 6 months, and no more than 12 months, before the date on which the option is no longer exercisable. If the landlord fails to make this notification to the tenant within the specified time:</p> <ul style="list-style-type: none"> <li>the lease is taken to provide that the date after which the option is no longer exercisable is instead 6 months after the landlord notifies the tenant as</li> </ul>	<p>S.20J refers. Similar to NSW.</p> <p>However Part 4A Division 3 (rather than S.20J) applies to premises in a RSC excluding:</p> <ul style="list-style-type: none"> <li>a lease containing a certified exclusionary clause;</li> <li>fixed term leases of 6 months or less;</li> <li>a sublease where the term is as long as the head lease allows; and</li> <li>a lease excluded by regulation.</li> </ul> <p>Other than leases in relation to which a right of renewal exists, then unless tenant notifies landlord within 12 months before the end of the term, the landlord is to presume the tenant wants a renewal or extension of the term. The existing tenant is to have a right of preference (subject to specified exceptions) and the landlord must between 6 and 12 months before the end of the term begin negotiations with the tenant for a renewal or extension of the lease.</p>	<p>S.13B refers.</p> <ul style="list-style-type: none"> <li>Once a lease (including any extensions or renewals in the lease or conferred by S.13) has expired and the tenant has no available option terms remaining, the tenant has no further right to a new lease.</li> <li>If the tenant, within 12 months before the expiry of the lease requests in writing from the landlord a statement as to the landlord's intentions, the landlord must within 30 days of receiving the request give a written statement to the tenant of the landlord's intentions.</li> <li>If the landlord intends to grant the tenant a renewal of the lease then the statement must contain the terms and conditions of the proposed new lease (other than the rent which need not be given until 3 months</li> </ul>	<p>S.108 refers. The section applies to a lease for premises in the retail area of a shopping centre if the landlord proposes to re-lease the premises and the tenant wants to renew or extend the lease.</p> <p>Where the section applies, the landlord must allow the tenant to extend/renew the lease in preference to other possible tenants. The landlord must assume that the tenant intends to renew the lease unless it gives notice in writing to the contrary within 12 months before the end of the lease.</p> <p>The landlord may, however, offer the premises to a third party if it would be substantially more advantageous to the landlord to do so.</p> <p>The landlord is not required to give the tenant a preferential right if:</p> <ul style="list-style-type: none"> <li>the landlord reasonably wants to change the tenancy mix;</li> <li>the tenant has substantially or</li> </ul>	<p>S.29 refers. The lease may be terminated or renewed at any time prior to its expiry by written agreement between the parties. In the absence of agreement, the landlord is to give the tenant 3 months' prior notice as to whether or not landlord wishes to renew the lease, and if so, on what terms; or that the tenant is to remain as a periodical tenant on the current terms of the lease; or that the tenant may continue to occupy on a monthly tenancy on terms to be agreed. The tenant is to respond to the landlord within 30 days of receiving the notice unless the notice states that the lease will not be renewed. If the tenant fails to do so, the lease is not renewed.</p> <p>If the landlord fails to negotiate or give notice as to the landlord's intentions, then the terms of the lease may be extended (at the tenant's election) by a period equal to that period of non-compliance (i.e. by 3 months).</p>	<p>S.60 refers. Similar to S.44 of the NSW provisions where the lease contains no option for renewal.</p>

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	date to exercise the option (S.46).	<p>required; and</p> <ul style="list-style-type: none"> <li>if that date is after the term of the lease ends, the lease continues until that date, and the tenant, whether or not the landlord has then notified the tenant as required, may give written notice terminating the lease from a specified day that is on or after the date on which the term of the lease ends and before the date until which the lease would otherwise have continued, if extended under this section.</li> </ul>	If the landlord fails to negotiate or give notification as required by Part 4A Division 3, the term of the lease is extended until the end of 6 months after the landlord begins the required negotiations or gives the required notice, if the tenant requests the 6 month extension.	<p>before the expiry date). The statement will constitute an offer to lease.</p> <ul style="list-style-type: none"> <li>If the landlord fails to give the statement within the 30 day period after receipt of the request (ie either notifying the tenant that the landlord will not be granting any further lease or that the landlord is prepared to do so and the terms), the term of the lease is deemed to be extended by a period equal to that period of non-compliance. (The amending Act will rectify an error in the Act that enables the landlord not to respond and to hold the tenant to a lease longer than the contracted term without any right for the tenant to terminate).</li> </ul> <p>The amending Act will also introduce a S.13C (which will operate retrospectively) that is of similar effect to the NSW S.44.</p>	<p>persistently breached the lease;</p> <ul style="list-style-type: none"> <li>the tenant has signed an exclusionary certificate under S.111; or</li> <li>the lease is excluded from S.108 by regulation; or</li> <li>the landlord: <ul style="list-style-type: none"> <li>does not propose to re-lease the premises within 6 months after the end of the lease; and</li> <li>needs vacant possession during that period for the landlord's own purposes.</li> </ul> </li> </ul>	<p>No mention in Code of restriction on advertising.</p> <p>S 9 refers. Similar to NSW. Payment of key money regarding the granting, renewal, extension or assignment of a lease, is prohibited (and void).</p>	

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<b>KEY MONEY AND LEASE PREPARATION EXPENSES FOR RENEWAL OR EXTENSION PROHIBITED</b>							
<p>S.45 refers. Landlord is prohibited from obtaining key money or lease preparation expenses in connection with the renewal or extension of a lease and any provision to the contrary is void.</p> <p>Landlord, may however, recover from a tenant lease preparation expenses in connection with making certain amendments to a renewed or extended lease which were requested by the tenant.</p>	<p>Key money - S.39 and Schedule dictionary refers. Payment of key money or amount for tenant's goodwill is prohibited.</p> <p>Costs - S.24 and S.48 refer. Tenant is not liable for legal costs for preparing, renewing or extending a lease. Costs of survey, registration fees and legal costs for a variation or consent to sublease or licence may be recovered.</p>	<p>The key money prohibition in S.23 above applies in relation to the renewal of a lease and the granting of an option for the renewal of a lease.</p> <p>No specific provision concerning the costs of lease extensions or renewals, however an extension or renewal would be considered to be the grant of a lease and therefore S.51 refers and the landlord cannot recover expenses relating to:</p> <ul style="list-style-type: none"> <li>negotiation, preparation or execution of the lease;</li> <li>obtaining the consent of a mortgagee to the lease; or</li> <li>the landlord's compliance with the Act.</li> </ul>	<p>S.20L refers. Similar to NSW but no prohibition on recovering renewal lease preparation expenses.</p>	<p>No specific provision concerning lease extensions.</p> <p>The key money prohibition in S.9 above in relation to "leases" would apply equally to extensions of leases.</p> <p>Note above that under the amending Act a tenant will not be liable under S.14B for legal costs for preparing, renewing or extending a lease, and that provision will operate retrospectively.</p>	<p>S.38 refers. Landlord must not ask for or accept key money in connection with the renewal or extension of a lease. Any money so received is a debt due and payable by the landlord to the tenant.</p> <p>No specific provision concerning costs of lease extensions, however an extension or renewal would be considered to be the grant of a lease and therefore subject to S.23 where each party must bear its own costs of preparing the lease.</p>	<p>Payment of key money in relation to the granting, renewal, extension or assignment of a lease is prohibited (refer Regulation 9 and the definition of "Key Money" in Regulation 1).</p> <p>The Landlord may, however, recover from the tenant the costs of any alterations required by the tenant to the lease (refer Regulation 8).</p>	<p>S.61 refers. Landlord must not seek or accept key money in connection with the renewal or extension of a retail shop lease. Any money so received is recoverable by the tenant from the landlord as a debt.</p> <p>This does not preclude a landlord from requiring payment by the tenant of legal expenses in connection with the renewal; or receiving payment of rent in advance; or securing performance of the tenant's obligations under the renewed or extended lease (via bond or security deposit); or seeking and accepting payment for the grant of a franchise in connection with the renewal or extension of the lease.</p>
<b>ADVERTISING OR PROMOTION</b>							
<p>S.52 refers. Provisions in the lease requiring the tenant to undertake any advertising or promotion of the tenant's business are void.</p>	<p>S.41 refers. If the tenant's contribution to a promotion amount is not to be treated as part of outgoings under the lease, the landlord may only apply promotion amounts for promotion and advertising directly attributable to centre and may include joint promotions and advertising with other RSCs.</p>	<p>S.69 refers. Similar to NSW.</p>	<p>S.53 refers. Similar to NSW.</p>	<p>No similar provision in WA to NSW S.52 provisions.</p> <ul style="list-style-type: none"> <li>S.12B governs contributions to marketing or promotion funds. S.12B provisions are similar to those discussed above in relation to S.12A sinking fund.</li> </ul>	<p>SS.131 and 132 refer. The landlord may recover advertising and promotion levies only if a marketing plan with expenditure details is made available to the tenant:</p> <ul style="list-style-type: none"> <li>before the lease is entered into in respect of the landlord's first accounting period; and</li> <li>at least 1 month before</li> </ul>	<p>S.34 refers. The landlord cannot charge a tenant for advertising or promotion costs incurred in the promotion of the landlord only. However, if the landlord does charge the tenant other advertising or promotion costs, then the landlord must provide an annual marketing plan, including a budget, to the tenant. The landlord may</p>	<p>S.68 refers - similar to NSW.</p>

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				<ul style="list-style-type: none"> <li>The purpose of the fund must be specified in the lease.</li> <li>The landlord may only apply the fund to the specified purpose and to taxes and imposts on the fund, the cost of an end of accounting year audit by a registered company auditor and accountant, .</li> <li>The fund must be paid into one or more appropriately designated interest bearing accounts held by the landlord with a bank or financial society in WA.</li> <li>Full and accurate accounts and records must be kept.</li> <li>At the end of each accounting year the accounts must be audited by an auditor who is a registered company auditor within the meaning of the Corporations Act.</li> <li>A copy of the auditor's report must be distributed to a tenant within 3 months after the end of the relevant accounting period.</li> <li>If a tenant, within 3 years after the tenant receives the copy of the report referred to above, notifies the landlord that there is a deficiency in the fund due to any non compliance of the foregoing obligations by the landlord (or by any predecessor of the</li> </ul>	<p>each subsequent accounting period.</p> <p>Similar requirement for opening promotions.</p>	not require the tenant to undertake any advertising of the tenant's business in addition to the tenant's contribution to outgoings for advertising and promotion specified in the lease.	

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				landlord) then the landlord is liable for the deficiency.			
<b>MARKETING PLAN</b>							
SS.53-55A refer. Requires a landlord to incur costs in providing to the tenant a marketing plan, a written expenditure statement, and an advertising statement accompanied by an auditor's report on advertising and promotion expenditure.  A tenant may withhold payment of contributions in respect of advertising or promotion costs of the landlord in circumstances where the landlord has failed to act appropriately.	No mention in the Act.	At least 1 month before the start of each accounting period of the landlord, the landlord must provide the tenant with a marketing plan that gives details of the landlord's proposed expenditure.	SS.54 and 55 refers. Similar to NSW.	S.12B above refers.  No requirement in WA for the preparation of a marketing plan and provision to tenants.	See above.	S.34 refers. See above and similar to NSW.  No mention in Code of any right of the tenant to withhold payment.	S.69 refers - similar to NSW, however the NT does not permit the tenant to withhold payment.
<b>GEOGRAPHICAL RESTRICTIONS</b>							
S.59 refers. The lease must not contain a provision restricting the tenant from carrying on business outside the RSC either during or after the expiry of the lease.	No mention in the Act.	S.74 refers. Similar to NSW.	S.59 refers. Similar to NSW.	No mention in the Act and no prohibition. General law restraint of trade applies and reasonable restraint permitted.	S.141 refers. The lease must not contain any provisions preventing or restricting the tenant from carrying on business outside the shopping centre either during or after the term of the lease.	No mention in the Code.	S.74 refers - similar to NSW.
<b>TRADING HOURS</b>							
S.61 refers. The landlord may not change core trading hours of a shopping centre except with the approval in writing of a majority of the retail shops in the centre.	SS.51, 52 and 53 refer. Core trading hours means the hours not outside the allowable trading hours under the Trading (Allowable Hours) Act 1990 that are passed by a resolution supported by at least 75% of retail shops in a shopping centre (on the basis of 1 vote for each eligible shop).	S.66 refers. Similar to NSW.	S.61 refers. Trading hours can only be regulated if: <ul style="list-style-type: none"> <li>the shop is within an "enclosed shopping complex" (as defined in the Act);</li> <li>the lease does not reduce permitted hours to less than 50 hours per week;</li> <li>core trading hours do not exceed 54 hours</li> </ul>	S.12C and S.12 refer and are markedly different from all other states. Under the Act the landlord can set the trading hours for the centre (subject to any contractual arrangements the landlord may have made altering those rights).  However, under S.12C, a provision in a retail shop lease requiring a tenant to	S.140 refers. The tenant may trade outside core trading hours with the landlord's agreement provided the tenant meets the costs (calculated proportionately where there are other tenants operating outside the core hours), including advertising and promotion costs associated with opening and operating the shopping centre for the	S.38 refers. Trading hours for a shopping centre are divided into 3 categories, being, core trading hours, centre trading hours, and special trading hours. Core trading hours may be negotiated between landlords and tenants, and once negotiated, the tenants must open during the agreed minimum hours of trading. Centre trading	S.75 refers - similar to NSW.

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	<p>Until a resolution is passed:</p> <ul style="list-style-type: none"> <li>for leases existing before the commencement of the Trading Amendment Act (i.e. 16 May 1994) the trading hours immediately prior to that Act; or</li> <li>for other leases - the trading hours required by the landlord.</li> </ul> <p>A provision which requires the tenant to trade outside the hours permitted under the Trading Amendment Act is void.</p>		<p>per week and do not include any time on a Sunday, and have been approved by 75% of voters.</p> <p>The provisions in this section should be read in conjunction with the Shop Trading Hours Act 1977 (SA).</p>	<p>open the shop at specified times is void. The tenant of a retail shop is free to stay closed whenever the tenant wishes to do so.</p> <ul style="list-style-type: none"> <li>If the landlord refuses to grant the tenant a lease renewal and the tenant believes the refusal is because the tenant did not open the shop at specific times, the tenant can apply to WA SAT for compensation for pecuniary loss suffered by the tenant as a result of the non renewal.</li> </ul> <p>Under S.12(1)(c) the landlord cannot recover costs from a tenant under a retail shop in a group of premises where that tenant was not open for trade outside the standard trading hours.</p>	<p>additional hours.</p> <p>Core trading hours means the time when retail premises in the shopping centre are generally required to be open (see dictionary).</p>	<p>hours are the times that the centre facilities must be made available and during which any shop may trade. Special trading hours are the times outside centre trading hours and are negotiable between the landlord and the tenant and they are not compulsory so that the tenants may open if they wish. To change trading hours, a resolution must be passed by 2/3 of the total number of tenants voting at the meeting of tenants occupying the retail premises within the shopping complex.</p>	
<b>UNCONSCIONABLE CONDUCT AND MISLEADING AND DECEPTIVE CONDUCT</b>							
<p>Part 7A and SS.62A and 62B provide that the landlord or tenant must not engage in conduct that is, in all the circumstances, unconscionable. A party that suffers loss or damage by reason of unconscionable conduct may recover the amount of loss or damage by lodging a claim with the NSW SAT.</p> <p>These sections can potentially apply to retail shop leases entered into</p>	<p>S.46A refers. A landlord or a tenant must not engage in conduct which is, in all the circumstances, unconscionable.</p> <p>QCAT may determine if a party has acted unconscionably and take into account matters similar to those provided for in the ACT Act.</p>	<p>Part 9 refers. Similar to NSW except there is no provision for misleading and deceptive conduct and claims must be lodged with the Victorian Civil and Administrative Tribunal.</p>	<p>No specific section in Act. (However note S.20A (term of lease) which states objects of minimum 5 year term requirements is to achieve "practicable fair dealing" between the landlord and the tenant in relation to renewal/extension of lease.)</p>	<p>Part IIA of the Act refers.</p> <p>Unconscionable conduct:</p> <p>A landlord or a tenant under a retail shop lease must not engage in conduct that is, in all the circumstances, unconscionable.</p> <p>A party who suffers loss or damage by reason of unconscionable conduct that contravenes the Act may recover the amount of</p>	<p>S.22 refers. A party to a lease or negotiations for a proposed lease must not deal with other parties to the lease or negotiations in a manner which is unconscionable, or harsh and oppressive.</p> <p>The Magistrates Court may consider any of the following matters when determining as such:</p> <ul style="list-style-type: none"> <li>the relative strengths of the bargaining positions of the parties;</li> </ul>	<p>S.3 refers. A person must not engage in conduct that is harsh, unjust or unconscionable. Unconscionable conduct may include the threat by a property owner to subsidise a competitor to the tenant in nearby premises; or not to renew a lease unless the tenant agrees to a proposal of the property owner or is prepared to pay a rental in excess of the CMR.</p> <p>S.23(1)(e) refers. The</p>	<p>Part 10 refers, Unconscionable conduct provisions - similar to S.62A and B in NSW but the claim is lodged with a court.</p> <p>No provisions for misleading and deceptive conduct.</p>



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<p>prior to the commencement of the Act.</p> <p>SS.62D and 62E provide that a party to a retail shop lease must not engage in conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive. A party who suffers due to the latter conduct may recover the amount of loss or damage by lodging a claim under S.71.</p>				<p>loss or damage by lodging a claim with WA SAT.</p> <p>Part IIA also applies to retail shop leases entered into prior to Part IIA coming into operation.</p> <p>In determining whether a party has acted unconscionably, the WA SAT may take into account matters similar to those provided for in the ACT Act and also:</p> <ul style="list-style-type: none"> <li>the requirements of any applicable industry code;</li> <li>the extent to which a landlord or tenant was willing to negotiate the terms and conditions of any lease or the rent with the other party;</li> <li>the extent to which a landlord or tenant unreasonably used information about the turnover of the tenant or a previous tenant's business to negotiate the rent; and</li> <li>the extent to which: <ul style="list-style-type: none"> <li>in the case of the landlord, he required the tenant to incur reasonable refurbishment or fitout costs; or</li> <li>in the case of a tenant, he was willing to incur reasonable refurbishment or fitout costs.</li> </ul> </li> </ul> <p>Misleading and deceptive conduct:</p>	<ul style="list-style-type: none"> <li>whether the conduct required the other party to comply with conditions which were not reasonably necessary for the protection of the legitimate interests of the party engaging in the conduct;</li> <li>whether the party who did not prepare the lease could understand its conditions;</li> <li>whether undue influence, pressure or unfair tactics were used;</li> <li>whether the tenant could have acquired a lease on similar terms for similar premises from another person;</li> <li>the extent to which the landlord's conduct was consistent with its conduct in similar lease transactions towards similar tenants;</li> <li>the requirements of the Act;</li> <li>whether there was proper disclosure of intended conduct or risk; and</li> <li>the extent to which the parties acted honestly.</li> </ul>	<p>landlord must compensate the tenant if he acts in a manner which, in all the circumstances, is unconscionable.</p> <p>S.7(3) refers. If the landlord provides a DS containing misleading information, the tenant may, in addition to other rights, terminate the lease within 3 months after its commencement.</p>	

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				<p>The amending Act will introduce a new Division 2 which is similar to NSW SS.62D and 62E except that the claim is brought before the WA SAT.</p> <p>Misleading and deceptive conduct is defined as 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.</p> <p>Division 2 will not apply to conduct that occurred before the relevant provisions in the amending Act are proclaimed.</p> <p>A misleading or deceptive conduct claim must be lodged within 6 years after the alleged conduct occurred.</p> <p>The amending Act gives the Tribunal extensive powers in relation to the orders it may make.</p>			
<b>DISPUTE RESOLUTION</b>							
<p>Part I refers. S.63 covers RTDs being disputes between parties to a retail shop lease even if the lease is entered into before the commencement of the Act.</p> <p>S.68 provides that RTDs or other disputes or matters specified cannot be the subject of any court proceedings (defined to include a tribunal or an arbitrator), unless the Act-</p>	<p>Parts 8 and 9 refer. The Act provides for resolution of disputes through mediation (SS.55 - 62) and by reference or application to the QCAT processes under the QCAT Act 2009 (SS.63-64) respectively.</p> <p>Where a dispute has not been resolved through mediation, a mediator or party may refer a dispute to QCAT in specified</p>	<p>Part 10 refers. Similar to NSW. RTD means any dispute between a landlord and tenant arising under or in relation to a lease of retail premises even if the Act or former retail legislation does not apply. RTD does not include a dispute solely relating to payment of rent or a dispute re turnover or CMR capable of determination by a SRV.</p>	<p>SS.63 to 69 refer. Parties to a retail shop lease may refer a dispute to the Small Business Commissioner for mediation.</p> <p>The Commissioner may intervene in proceedings before a court concerning a dispute about a retail shop lease.</p> <p>The Magistrates Court is the relevant jurisdiction</p>	<p>Part III refers.</p> <p>See below for WA SAT jurisdiction.</p> <p>Where both the WA SAT and a court has jurisdiction, proceedings may be instituted before either the court or the WA SAT, but not both.</p> <p>If proceedings are instituted before a court, but the WA</p>	<p>Part 14 refers. The Magistrates Court has jurisdiction to hear and determine applications (S.144). S.17 sets out disputes in relation to which an application may be made.</p> <p>SS.147, 148 and 149 refer. The Magistrates Court must hold a case management meeting to determine whether resolution is likely</p>	<p>S.39 refers. The parties must first attempt to resolve any dispute by direct negotiations. If this fails, either party may request the Office of Consumer Affairs and Fair Trading to investigate the dispute and attempt to negotiate a mutually acceptable solution. If the dispute remains unresolved, then either party may refer the dispute to the Retail</p>	<p>Part 11 refers. Retail tenancy claims can only be the subject of court proceedings where the remedy sought is in the nature of an injunction, or if the Commissioner of Business Tenancies certifies that the parties have failed to resolve the claim after a preliminary conciliation conference and the amount claimed exceeds \$10,000.</p>

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appointed Registrar has certified that mediation or some other form of alternative dispute resolution of the dispute has failed. S.67 provides that mediation is not limited to formal mediation procedures. An exception to this provision is if a court is otherwise satisfied that mediation under the Act is unlikely to resolve the RTD.	<p>circumstances. QCAT may direct the parties to attend compulsory conferences or mediation (QCAT Act SS. 67 and 75)</p> <p>The QCAT also allows tenants and franchisees to apply to be joined to a QCAT proceeding including regarding compensation claims and refer matters to the QCAT even though they are not the tenant (QCAT Act S.42).</p>	Before the RTD goes before the Tribunal, the Small Business Commissioner must certify in writing that mediation or another appropriate form of alternative resolution has failed or is unlikely to resolve the RTD. This does not apply to injunctions.	(unless the claim involves a monetary claim exceeding \$40,000.00, in which case the Magistrates Court must on the application of a party to a proceeding refer the matter to the District Court).	<p>SAT also has jurisdiction the parties may agree, or the court may determine, that the matter be transferred to the WA SAT. The matter will then be transferred to the WA SAT and will be heard and determined as if instituted before the WA SAT.</p> <p>The converse also applies to proceedings instituted before the WA SAT.</p> <p>Each party to a reference to the WA SAT must have the carriage of the party's own case and cannot be represented by an agent unless:</p> <ul style="list-style-type: none"> <li>the party is a body corporate in which case the WA SAT is to approve the agent; or</li> <li>the WA SAT is of the opinion that a party should be permitted to be represented by an agent and approves the agent.</li> </ul> <p>A person with a legal qualification or who is a professional advocate is not eligible to represent a party unless the WA SAT is aware of the ineligibility but consents.</p> <p>Hearings before the WA SAT are to be held in public, although a party may apply for an order that it be held in private: s 61 State Administrative Tribunal Act 2004 (WA).</p> <p>SBC:</p>	<p>or not and if:</p> <ul style="list-style-type: none"> <li>likely, the Court must promote settlement either at the meeting or by referral to other dispute resolution; mechanisms or</li> <li>unlikely, the Court must give directions about how the proceedings will be conducted.</li> </ul> <p>Procedures for hearings are outlined in S.151 and, if appropriate, the proceeding may be transferred to the Supreme Court (S.152).</p>	Tenancies Code of Practice Monitoring Committee for conciliation. If all fails, then either party may refer the dispute to a court of competent jurisdiction.	<p>Parties to retail tenancy proceedings may be represented by lawyers but the parties are not entitled to costs, and where a matter proceeds to court and the amount recovered is less than \$10,000, no costs are recoverable unless the court is satisfied that there were reasonable grounds for the plaintiff to believe that he was entitled to \$10,000 or more.</p> <p>Where the amount claimed is less than \$10,000, an inquiry is conducted by the Commissioner, who may make the appropriate orders.</p> <p>Unconscionable conduct claims are excluded from the tenancy dispute provisions, and must be brought before a Court.</p>

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				<p>The SBC is a new concept in WA. The role has been set up under the Small Business Development Corporation Act, 1983 by the Small Business and Retail Shop Legislation Amendment Act, 2011. That legislation has also extended the role of the SBC into the retail Act.</p> <p>For example, S.25A allows persons to a retail shop lease who are entitled to take a matter to SAT to request the SBC to provide assistance or an alternative dispute resolution process for the matter.</p> <p>Under S.25D a matter cannot be brought before SAT for determination unless the SBC has issued a certificate under S.25C that alternative dispute resolution is unlikely to resolve the matter, would not be reasonable or has failed. The SBC certificate can also be used by the SBC to include a report to SAT about the conduct of the parties in any dispute resolution before the SBC.</p> <p>Certain disputes may be excluded from S.25D by regulation and there will be no need for SBC certification prior to going direct to SAT.</p> <p>Under S.25E the SBC may at any time intervene in SAT proceedings.</p>			

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				<p>Under S.30A the role of SBC in relation to the retail Act is to provide assistance in attempting to resolve disputes under retail shop leases or to provide information and guidance in relation to retail shop leases.</p> <p>Under S.33 SAT can have regard to the SBC's certificate (e.g. conduct of the parties) when awarding costs.</p>			
<b>RTC BY COMMERCIAL TRIBUNAL</b>							
<p>S.S.70, 71, 71B refers. A party to a lease, instead of initiating court proceedings, may, after having exhausted the mediation requirements of the Act, make a RTC with the NSW SAT. A RTC is a claim in connection with a RTD and includes a claim for payment of money, relief from payment of money, or a claim for the doing of specific work or the provision of specified services. It also includes a claim for the surrender of possession, assignment of rights under a lease, a declaration that the landlord cannot withhold consent to an assignment, a claim for relief against forfeiture and a claim for rectification of the lease. A party may also lodge a claim for relief for unconscionable conduct with the NSW SAT.</p>	<p>S. 64 refers. Provided the lease has not ended more than 1 year before the dispute notice was lodged, and other specified criteria are satisfied, a party may refer a dispute to the QCAT.</p> <p>QCAT does not have jurisdiction to hear a dispute regarding arrears of rent (unless the dispute is also about the payment of compensation by the Lessor) for the amount of rent or outgoings payable. However QCAT can hear a dispute about the procedure for determining rent or the basis upon which outgoings are payable (S.103). QCAT also has jurisdiction to set aside a valuation if not made in accordance with the Act and to order rectification of a lease with the parties' consent (S.83).</p>	<p>SS. 89- 92 refer. The Tribunal has jurisdiction to hear and determine an application by a landlord or tenant under a retail premises lease or by a SRV seeking resolution of a RTD.</p> <p>In an application for forfeiture or relief against forfeiture (whether or not for non-payment of rent), the Tribunal has the same jurisdiction, including equitable jurisdiction, and powers as the Supreme Court.</p> <p>The Tribunal's jurisdiction is exclusive in relation to RTDs other than an application for relief against forfeiture or a claim under Part 9 for unconscionable conduct. Recovery of prohibited key-money and goodwill payments may be made in</p>	No mention in the Act.	<p>Part III refers as above.</p> <p>Any question between the parties under a retail shop lease may be referred to the WA SAT and WA SAT is to:</p> <ul style="list-style-type: none"> <li>determine whether the question does arise under the lease (which determination can be made in such manner as the WA SAT thinks fit, subject to each party being given an opportunity to make a written submission); and</li> <li>if so, hear the question with a view to achieving a solution acceptable to the parties.</li> </ul> <p>Under the amending Act S.3(3) is amended to make it clear that a question arising under a retail shop lease also extends to</p>	<p>From 1 July 2002, the ACT Magistrates' Court took over the role of the Tenancy Tribunal established by the repealed Tenancy Tribunal Act 1994 (ACT). The transitional provisions in Part 16 of the Leases (Commercial and Retail) Act 2001 (ACT) expired on 30 June 2006 (S.171). Therefore, the Act does not provide for a formal dispute resolution procedure outside the court system.</p>	No mention in the Code.	<p>Division 4 of Part 11 refers. Where the parties fail to resolve the dispute through conciliation and the amount in dispute is less than \$10,000, the matter proceeds to an inquiry before the Commissioner of Business Tenancies.</p> <p>An order of the Commissioner can be registered as an order of the Local Court.</p>

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<p>A claim under these sections may not be lodged more than 3 years after the liability or obligation that is the subject of the claim arose. The monetary limit of the NSW SAT's jurisdiction is \$300,000.</p> <p>A retail tenancy claim may be lodged more than 3 years but no later than 6 years after the liability or obligation that is the subject of the claim arose, if the NSW SAT orders that the claim may be lodged with the NSW SAT.</p>	<p>Parties generally bear their own costs of proceedings (QCAT Act S.100). QCAT may make a costs order in the interests of justice or where the dispute is frivolous or vexatious, or a party has caused further costs through delay, failing to comply with the Act or to attend mediation or a hearing (QCAT Act, SS.48(1) and 102).</p> <p>Cost penalties may apply under the Rules if an earlier offer to settle the dispute has been made but not accepted (QCAT Act (S.105)).</p>	Court or by order of the Tribunal.		<p>questions concerning forfeiture.</p> <p>If a solution acceptable to the parties is obtained and is reduced to writing and signed by the parties ("mediation agreement") the agreement is filed with the WA SAT.</p> <p>Where a mediation agreement is not possible or a mediation agreement is obtained but breached, the matter can then be referred to the WA SAT for determination.</p> <p>The WA SAT has jurisdiction to hear:</p> <ul style="list-style-type: none"> <li>an application by the tenant for a compensation order under particular sections in the Act which give the tenant rights to compensation (e.g. failure by the landlord to give DS or incorrect information in DS);</li> <li>a key money debt action;</li> <li>referrals of questions arising under a retail shop lease;</li> <li>unconscionable conduct claims or misleading and deceptive conduct claims if at the time the application was made no civil proceedings had been commenced before a court.</li> </ul>			
<b>APPEALS</b>							
S.77 refers. In specified	S.126 QCAT Act refers. A	S.148 Victorian Civil and	No mention in the Act.	No mention in the Act.	S.155 refers. A party may	No mention in the Code.	Part 12 refers. An appeal

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<p>circumstances, appeals can be made from a decision of the NSW SAT:</p> <ul style="list-style-type: none"> <li>to an Appeal Panel and then to the Supreme Court (other than in regard to unconscionable conduct claims); and</li> <li>to the Supreme Court (in regard to unconscionable conduct claims).</li> </ul> <p>A party to any proceedings in which the NSW SAT makes an order or other decision under this Act may appeal to an Appeal Panel of the NSW SAT under Part 1 of Chapter 7 of the Administrative Decisions Tribunal Act 1997 (NSW).</p>	<p>decision of the QCAT is binding on all parties to the proceeding and may be registered as a court order (QCAT Act SS.131 and 132).</p> <p>Appeals from non-judicial QCAT member s decisions lie to the QCAT Appeals Tribunal, or to the Court of Appeal against a decision by a judicial QCAT member or on questions of law. Appeals lie to the Court of Appeal against decisions of the QCAT Appeals Tribunal on a question of law relating to a cost amount decision or a final decision with leave of the Court of Appeal (QCAT Act S.150). QCAT decisions may be reopened where certain grounds exist (QCAT SS.138-141).</p> <p>QCAT may change a final tribunal decision to correct a clerical error, an error arising from an accidental slip or omission, a material miscalculation of figures, material error in the description of an entity, thing or matter referred to in the decision or a defect of form. QCAT Act S.135).</p>	<p>Administrative Tribunal Act 1998 refers. A party may appeal on a question of law to the Court of Appeal or Trial Division of the Supreme Court if leave is given.</p>		<p>S.105 of the State Administrative Tribunal Act 2004 (WA) refers. A party may appeal from a decision of the WA SAT on a question of law and with leave of the court, to the Court of Appeal if the Tribunal included a judicial member, or to the Supreme Court.</p>	<p>appeal to the Supreme Court on a question of law or fact from a decision of the Magistrates Court. The appeal should be made within 28 days after the order appealed from was made (under Rule S.103 of the Court Procedure Rules 2006 (ACT)).</p>		<p>against an order of the Business Tenancies Commissioner may be made to the Local Court as an appeal de novo.</p> <p>The appeal must be lodged within 14 days of the date that the reasons for the order are given to the parties.</p>
<b>THE ACT BINDS THE CROWN</b>							
<p>S.83 refers. The 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.</p>	<p>SS.10 and 12 refer. The Act binds all persons including the Crown (Qld) and, so far as Parliament permits, the Commonwealth and the other States. The Act</p>	<p>S.14 refers. Similar to NSW.</p>	<p>No mention in the Act.</p>	<p>S.5 refers. The Act binds the Crown in the right of WA and, insofar as the legislative power of Parliament permits, the Crown in all its other capacities.</p>	<p>No mention in the Act.</p>	<p>No mention in the Code.</p>	<p>S.4 refers. The Act binds the Crown in the right of the Northern Territory, and, to the extent the power of the Legislative Assembly permits, the Crown in all its other capacities.</p>

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	<p>applies to all leases of retail shop premises in Queensland:</p> <ul style="list-style-type: none"> <li>• regardless of where the lease is entered into; and</li> <li>• even though the lease purports to be governed by a law other than Queensland law.</li> </ul>						



## Definitions

"**AASB**" means Australian Accounting Standards Board.

"**ACT Act**" means Leases (Commercial and Retail) Act 2001 (ACT).

"**API**" means Australian Property Institute

"**CMR**" means current market rent.

"**CMV**" means current market value.

"**Corporations Act**" means the Corporations Act 2001 (Cth).

"**DS**" means disclosure statement.

"**NSW SAT**" means the Administrative Decisions Tribunal of NSW.

"**QCAT**" means Queensland Civil and Administrative Tribunal.

"**RSC**" means retail shopping centre.

"**RTC**" means retail tenancy claim.

"**RTD**" means retail tenancy dispute.

"**SAT**" means State Administrative Tribunal.

"**SBC**" means Small Business Commissioner.

"**SRV**" means specialist retail valuer.

"**TFS**" means tenancy fit-out statement.

"**Trading Amendment Act**" means the Trading (Allowable Hours) Amendment Act 1994 (QLD).

"**WA SAT**" means the State Administrative Tribunal of Western Australia.

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