



Australian Capital Territory

# **Leases (Commercial and Retail) Act 2001 No 18**

## **Republication No 1**

Republication date: 1 July 2002

Act not amended up to this date

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Leases (Commercial and Retail) Act 2001* as in force on 1 July 2002. It includes any commencement, repeal or expiry affecting the republished law and any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes).

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

# Leases (Commercial and Retail) Act 2001

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Australian Capital Territory

# **Leases (Commercial and Retail) Act 2001**

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An Act to regulate commercial and retail leases and tenancies, and for other purposes

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## Part 1 Preliminary

### 1 Name of Act

This Act is the *Leases (Commercial and Retail) Act 2001*.

### 3 Notes

A note included in this Act is explanatory and is not part of this Act.

*Note* See *Legislation Act 2001*, s 127 (1), (4) and (5) for the legal status of notes.

## Part 2 Interpretation

### 4 Dictionary

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain words and expressions used in this Act, and includes references (*signpost definitions*) to other words and expressions defined elsewhere in this Act or in other legislation.

For example, the signpost definition ‘*GST*—see the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth), dictionary.’ means that the expression ‘*GST*’ is defined in the dictionary to that Act and the definition applies to this Act.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see *Legislation Act 2001*, s 155 and s 156 (1)).

### 5 When is a lease *entered into* to work out timing for obligations under this Act?

If something is required to be done under this Act within a stated time before or after someone enters into a lease, the lease is taken to have been *entered into* when the earliest of the following happens:

- (a) the execution of the lease by the parties to it;
- (b) the entering into possession of the premises by the tenant under the lease.

### 6 When is a lease taken to be renewed for this Act?

- (1) A new lease is taken to be a renewal of another lease (the existing lease) for this Act if the new lease is between the same parties as the existing lease and relates to the same premises and the premises are to be put to the same or similar use.

- (2) This section does not apply to a renewal mentioned in section 16 (Application of Act to pre-existing leases on registration of units plans).

## 7 When are premises commercial or retail premises?

- (1) Premises under a lease or proposed lease are commercial premises if—
- (a) the permitted use of the premises under the lease or proposed lease is for commercial business; or
  - (b) if there is nothing in the lease about the use the premises are to be put to—a commercial business may be carried on on the premises under the Territory lease for land that includes the premises.
- (2) Premises under a lease or proposed lease are retail premises if—
- (a) the permitted use of the premises under the lease or proposed lease is for retail business; or
  - (b) if there is nothing in the lease about the use the premises are to be put to—a retail business may be carried on on the premises under the lease granted under the Territory lease for land that includes the premises.

- (3) For this section:

**commercial business** means a business not involving—

- (a) the sale or hire of goods by retail; or
- (b) the supply of services by retail.

**retail business** means a business involving—

- (a) the sale or hire of goods by retail; or
- (b) the supply of services by retail.

**8 What are *shopping centres*?**

- (1) A shopping centre is a group of premises where—
- (a) at least 5 of the premises are—
    - (i) retail premises; or
    - (ii) small commercial premises; or
    - (iii) premises prescribed under the regulations for section 12 (1) (k); or
    - (iv) a mixture of the premises mentioned in subparagraphs (i) to (iii); and
  - (b) the premises—
    - (i) have, or would have if leased, the same lessor or same head lessor; or
    - (ii) are units in a single unit plan under the *Unit Titles Act 2001* and are managed by a single person; and
  - (c) the premises are—
    - (i) in a single building; or
    - (ii) in buildings that adjoin, or are separated only by areas owned by the lessor of the premises; and
  - (d) the group of premises is promoted as, or generally regarded as making up, a shopping centre, shopping mall, shopping court or shopping arcade.
- (2) In addition, a shopping centre is a group of premises prescribed under the regulations for this subsection.

**9 What is a *change of use lease*?**

A lease for premises is a *change of use lease* if—

- (a) this Act did not apply to the lease when the lease was entered into; and

- (b) the permitted use of the premises changes during the lease term by agreement between the parties; and
- (c) this Act would have applied to the lease if the lease had had the changed use when it was entered into.

**10 What is a *continuous occupation lease*?**

- (1) A continuous occupation lease is a lease for premises for a term of less than 6 months if—
  - (a) the tenant was in occupation of the premises with the owner's consent when the lease was entered into; and
  - (b) the tenant has been in continuous occupation of the premises with the owner's consent for at least 6 months.
- (2) However, a proposed lease is not a continuous occupation lease.

**11 What is an *excluded area*?**

- (1) An excluded area is an area of a shopping centre—
  - (a) without retail premises, small commercial premises and premises prescribed under the regulations for section 12 (1) (k); and
  - (b) that is geographically distinct (even if it is in the same building) from the areas in the shopping centre containing premises mentioned in paragraph (a).
- (2) However, an excluded area does not include a common area within the shopping centre adjacent to premises mentioned in subsection (1) (a).

## Part 3 Application

### 12 What leases does this Act apply to?

- (1) This Act applies to a lease for premises, in the ACT, of the following kinds:
- (a) retail premises other than large excluded premises;
  - (b) premises located in the retail area of a shopping centre other than large excluded premises;
  - (c) small commercial premises;
  - (d) premises under a lease to an association incorporated under the *Associations Incorporation Act 1991*, or an entity eligible to be incorporated under that Act, other than premises used for residential purposes;
  - (e) premises under a lease to an unincorporated charitable entity, other than premises used for residential purposes;
  - (f) premises under a lease that are used to provide a combination of business accommodation and secretarial services;
  - (g) premises under a lease that are used as a child care centre;
  - (h) premises under a lease that are used as a sports centre (other than premises covered by another paragraph);
  - (i) premises under a lease that are used as an art gallery;
  - (j) premises under a lease that are used as a gardening supply centre;
  - (k) premises prescribed under the regulations for this subsection.

*Note* **Large excluded premises** is defined at the end of the section, and **small commercial premises** is defined in the dictionary.

- (2) However, this Act does not apply to a lease if—
- (a) the lease is for premises prescribed under the regulations for this paragraph; or
  - (b) the lease is prescribed under the regulations for this paragraph; or
  - (c) the lease is for less than 6 months, unless the lease is a continuous occupation lease.
- (3) Also, section 139 (Changing core trading hours) applies in relation to each lease for premises in the retail area of a shopping centre.
- (4) For this section, it does not matter whether the lease was entered into outside the ACT or purports to be governed by the law of a jurisdiction other than the ACT.
- (5) For this section, a lease includes—
- (a) an agreement, whether in writing or not, that provides for the occupation of premises exclusively or otherwise, whether for a fixed term, periodically or at will; and
  - (b) a sublease or licence.
- (6) However, a lease does not include—
- (a) an agreement relating to the common area of a shopping centre that would be included only because it provides for someone to use a part of the area; or
  - (b) a Territory lease; or
  - (c) a lease of vacant land; or
  - (d) a right to occupy land to build on the land.
- (7) For this section:

***large excluded premises*** means premises with a lettable area larger than 1000m<sup>2</sup> that are leased to a listed public company or a subsidiary of a listed public company.

**13 How to work out the lettable area of premises**

- (1) If it is necessary to work out the lettable area of premises for this Act, the premises must be measured in a way, and by someone, agreed between the parties.
- (2) However, if the parties cannot agree how the premises are to be measured, the Magistrates Court may, on application by a party, decide the way in which the premises are to be measured or appoint someone to measure the premises.
- (3) Unless the Magistrates Court decides otherwise—
  - (a) the lessor must pay for the first measurement of premises; and
  - (b) the lessor and tenant must pay equal shares for any further measurement.

**14 Application to change of use leases**

This Act applies to a change of use lease from the time of the change of use.

**15 Is assignment the same as entering into lease for working out application of Act?**

- (1) In working out whether this Act applies to a lease, a person (the *assignee*) is not taken to have entered into the lease only because the lease was assigned to the person.
- (2) However, if this Act applied to the lease immediately before the lease was assigned, subsection (1) has the effect of ceasing the application of this Act to the lease, or to a dispute in relation to the lease, only—
  - (a) if this Act would not have applied to the lease if the assignee had been the original tenant; and
  - (b) while that assignee is the tenant.

**16 Application of Act to pre-existing leases on registration of units plans**

- (1) This section applies if—
  - (a) a person leases premises (the *original lease*) that are subsequently registered as part of a units plan under the *Unit Titles Act 2001*; and
  - (b) because of the registration, the person enters a new lease (the *new lease*) that contains essentially the same terms as the original lease apart from any changes made because of the registration.
- (2) In working out whether this Act applies to the new lease, the new lease is taken to have been entered into when the original lease was entered into.

**17 Disputes**

This Act applies to a dispute about a matter mentioned in column 1 in the following table if—

- (a) the lease or proposed lease, or a provision of the lease or proposed lease, to which the dispute relates, was entered into, extended under an option, renewed or, for a provision only, varied, at or after the corresponding time mentioned in column 2 (if applicable); and
- (b) the conduct that caused the dispute complained of happened at or after the corresponding time mentioned in column 3.

**Table of disputes to which Act applies**

item	column 1 type of disputed matter	column 2 time lease entered etc	column 3 time of conduct
1	key money in relation to a lease or to negotiations for entering into a lease	any time	1 January 1995

item	column 1 type of disputed matter	column 2 time lease entered etc	column 3 time of conduct
2	a discretionary rent review clause of a lease	1 January 1994	(a) for a dispute about a discretionary rent review clause that has the effect of reserving to a party to the lease complete discretion about the rate of rent to apply— commencement day; or (b) in any other case—1 January 1995
3	a provision of a lease if— (a) the provision was varied or inserted as part of a variation; and (b) the variation happens on or after 1 January 1995; and (c) this Act would apply to the dispute if the lease had been entered into or extended under an option on or after commencement day	any time	1 January 1995
4	a claim by a party to a lease (the <i>first party</i> ) that another party to the lease has engaged	any time	1 January 1995

**Part 3** Application

Section 17

<b>item</b>	<b>column 1 type of disputed matter</b>	<b>column 2 time lease entered etc</b>	<b>column 3 time of conduct</b>
	in unconscionable or harsh and oppressive conduct towards the first party, if the conduct would be a contravention of section 22 (1)		
5	a claim by a party to a lease for recovery of possession, relief against forfeiture or recovery of rent	any time	any time
6	a claim by a party to a lease that the party is entitled to compensation under section 37, 78, 81, 91 or 136	any time	commencement day
7	a matter in relation to which an application may be made under section 57, 58, 84, 85, 87, 98, 99, 105, 123 or 126	unless this Act states otherwise, any time	unless this Act states otherwise, any time
8	any other dispute about a lease if the disputed matter is of a kind prescribed under the regulations as suitable for resolution under this Act	the date prescribed under the regulations in relation to the kind of dispute or, if prescribed under the regulations, any time	the date prescribed under the regulations in relation to the kind of dispute or, if prescribed under the regulations, any time
9	a claim by a party to a lease that another party to the lease has breached or is breaching	1 January 1995	commencement day

item	column 1 type of disputed matter	column 2 time lease entered etc	column 3 time of conduct
	this Act if the breach does not give rise to a dispute or claim under another item (other than item 10)		
10	any other matter not covered in column 1 of items 1 to 9 in relation to a lease or negotiations for entering into a lease or in relation to the use or occupation of premises to which the lease relates	any time	any time

*Note for item 6* The sections mentioned in the item deal with the following:

section 37—compensation for negotiation misrepresentations

section 78—demolition

section 81—compensation for disturbance

section 91—compensation for incomplete repair

section 136—relocation clauses.

*Note for item 7* The sections mentioned in the item deal with the following:

section 57—an application to appoint a new valuer if conflict of interest disclosed

section 58—an application to appoint a new valuer in other cases

section 84—an application about nonpayment of rent or outgoings

section 85—an application about payment of rent or outgoings

section 87—an application for a declaration about useability of premises

section 98—an application about an unreasonable refusal of consent

section 99—an application about the lessor presenting the Territory lease to allow endorsement of an assignment or sublease

section 105—an application to vary the terms of a lease extended because it was less than 5 years

section 123—an application for a termination order

section 126—an application for a warrant for eviction.

## **18 Disputes about leases no longer in force**

A dispute in relation to a lease that is no longer in force may be decided under this Act only if—

- (a) the lease was a lease to which this Act applies; and
- (b) an application in relation to the dispute is made within 6 years after the day, or the last day, the conduct giving rise to the dispute happened.

## Part 4 Relationship between act and leases

### 19 Void provisions

If a provision in a lease is inconsistent with this Act, the provision is void to the extent of the inconsistency.

### 20 Included provisions

- (1) If a provision of this Act, other than this section, requires a provision to be included in a lease, the lease is taken for all purposes to contain the provision required to be included.

*Note* Under s 14 (Application to change of use leases), s (1) applies to a change of use lease from the time of the change of use of the lease.

- (2) An obligation imposed on a party to a change of use lease that, because of the application of subsection (1), requires the party to take action before the lease is entered into, is taken to be satisfied if the party complies with the obligation to the extent possible within 14 days after this Act starts to apply to the lease.

*Note* A disclosure statement is required to be provided under this Act (see s 30), not under a provision taken to be included in the lease under s (1). Accordingly, s (2) does not apply to the provision of disclosure statements.

- (3) A lease entered into or renewed, or to which this Act begins to apply, on or after commencement day is taken for all purposes to include the standard provisions prescribed under the regulations for this subsection except to the extent that the parties are bound by contrary provisions in the lease, or a contrary agreement (whether written or unwritten).

### 21 Recovery of GST

- (1) This Act does not prevent a party to a lease requiring another party to pay an amount directly or indirectly attributable to GST payable

**Part 4** Relationship between act and leases

Section 21

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for a taxable supply made by the party to the other party under the lease.

- (2) For this section, it does not matter when the lease was entered into.

## Part 5                      Conduct of parties

### 22      Prohibited conduct in dealings

- (1) A party to a lease, or a party to negotiations for a proposed lease, must not, in dealings with another party to the lease or negotiations, engage in conduct that is unconscionable or harsh and oppressive.
- (2) Without limiting the matters the Magistrates Court may consider when making an order in relation to a dispute arising from an alleged contravention of subsection (1) in relation to unconscionable conduct, the court may consider any of the following matters:
  - (a) the relative strengths of the bargaining positions of the lessor and tenant;
  - (b) whether, because of conduct engaged in by a party to the lease or negotiations, the other party was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the party who engaged in the conduct;
  - (c) whether the party to the lease or negotiations who did not prepare the lease or another document relating to the lease could understand the lease or other document;
  - (d) whether undue influence or pressure was exerted on, or unfair tactics were used against, a party to the lease or negotiations (or an agent) by the other party to the lease or negotiations (or an agent) in relation to the lease or negotiations;
  - (e) the circumstances under which the tenant could have acquired a lease on similar terms over similar premises from someone other than the lessor;
  - (f) the extent to which the lessor's conduct towards the tenant was consistent with the lessor's conduct in similar lease transactions between the lessor and similar tenants;

- (g) the requirements of this Act;
  - (h) the extent to which a party to the lease or negotiations (the *failing party*) unreasonably failed to disclose to the other party (the *uninformed party*)—
    - (i) any intended conduct of the failing party that might affect the interests of the uninformed party; or
    - (ii) any risk to the uninformed party arising from the failing party's intended conduct that the failing party should have foreseen would not be apparent to the uninformed party;
  - (i) the extent to which the lessor and the tenant acted honestly.
- (3) Without limiting subsection (1), a lessor is taken to have engaged in harsh and oppressive conduct if—
- (a) the lessor discriminates against a tenant because the tenant is a member of, or intends to become a member of, an association to represent or protect the interests of tenants, or intends to form such an association; or
  - (b) the lessor's conduct has the effect of preventing a tenant from forming or joining, or compelling a tenant to form or join, an association to represent or protect the interests of tenants.
- (4) Without limiting subsection (1), someone is not taken to have engaged in unconscionable or harsh and oppressive conduct only because the person applied to the Magistrates Court under this Act.
- (5) When applying subsection (2), the Magistrates Court must not have regard to circumstances that were not reasonably foreseeable at the time of the alleged contravention.

## **23 Lease costs**

- (1) Each party to a lease, or negotiations for a lease, must bear the party's own costs in relation to the preparation of the lease.

- (2) However, if a party requires the lease to be registered under the *Land Titles Act 1925*, the party must pay any fee for registration of the lease.
- (3) For this section, lessor's costs include—
- (a) any stamp duty related to the lease; and
  - (b) if the lessor has a mortgagee—any fee for, or incidental to obtaining, the mortgagee's consent to the lease.

*Note* If the lessor requires the lease to be registered, the lessor must pay the costs under s (2) also.

#### **24 Notice of acceptance of lease offer**

- (1) If a person accepts a lease offer, the person must tell the other party to the lease of the person's acceptance in writing as soon as practicable after acceptance but, in any case, not later than 7 days after acceptance.
- (2) The lessor must take all reasonable steps to hasten registration of a lease under the *Land Titles Act 1925* if—
- (a) the lease offer is accepted; and
  - (b) the tenant requires the lease to be registered.

#### **25 Provision of copy of lease to tenant**

If a lease, or a provision of a lease, is in writing signed by the tenant, the lessor must give the tenant a copy of the lease or provision signed by the lessor and tenant—

- (a) if the lease is not to be registered—within 21 days after the lease is stamped at the office of the commissioner for revenue; or
- (b) if the lease is to be registered—within 21 days after the lease is registered by the registrar-general.

**26 Independent legal advice**

The lessor must not require the tenant to use the services of a lawyer nominated by the lessor.

**27 Tenant not required to pay fees**

If the tenant is required, in contravention of section 26, to use the services of a lawyer nominated by the lessor—

- (a) the tenant is not liable to pay fees for the lawyer's services in relation to the lease; and
- (b) the lessor is liable to pay the tenant the amount of any fee paid by the tenant to the lawyer for the services; and
- (c) the lessor is liable to pay any unpaid fee for the lawyer's services that the tenant is not liable to pay because of paragraph (a).

## Part 6 Negotiations

### 28 Copy of proposed lease to be provided

- (1) The lessor must give the tenant a copy of the proposed lease as early as practicable in negotiations for the lease.
- (2) Subsection (1) does not require the lessor to give a copy of the proposed lease to a tenant if the tenant has given, or indicated an intention to give, a copy of the proposed lease to the lessor.

### 29 Notice—short minimum term

The lessor must tell the tenant in writing as early as practicable in negotiations for a proposed lease that the lease cannot be extended under section 104 (Minimum 5 year lease) if—

- (a) the proposed term of the lease is less than 5 years; and
- (b) it would be inconsistent with the head lease under which the lessor holds the lease to extend the term.

### 30 Disclosure statements

- (1) This section applies to proposed leases and options to extend a lease.
- (2) The lessor must give the tenant a disclosure statement for the proposed lease at least 14 days before the lease is entered into.
- (3) If the lease contains an option to extend the lease, the tenant may, not earlier than 3 months before the tenant may exercise the option, require the lessor to give the tenant a disclosure statement.
- (4) If the tenant requires the lessor to give the tenant a disclosure statement under subsection (3), the lessor must give the statement to the tenant within 14 days.

- (5) The time limits mentioned in this section do not apply, or apply as varied, if the tenant provides the lessor with a certificate signed by a lawyer stating that the tenant is aware of the time limits under this section and has chosen to waive the time limits, or to vary them as set out in the certificate.
- (6) Subsection (5) does not allow a tenant to require more notice from a lessor than would otherwise be required under this section.

### **31 Form of disclosure statements**

- (1) A disclosure statement must be in the approved form.
- (2) A disclosure statement must—
  - (a) if the lessor's accounting period is not a financial year—state the accounting period; and
  - (b) contain a written estimate of the outgoings the tenant is required to contribute to under the lease that itemises the outgoings for the first accounting period of the lessor under the lease.

### **32 Return of disclosure statement**

If the tenant is given a disclosure statement by the lessor, the tenant must—

- (a) note on the statement the date the tenant receives the statement; and
- (b) sign the statement; and
- (c) return it to the lessor on or before the earlier of—
  - (i) the time the tenant returns the signed copies of the lease to the lessor; or
  - (ii) 3 months after the lease has been entered into.

**33 Disclosure statement and acknowledgment not lease or offer**

Neither the provision of a disclosure statement nor an acknowledgment of receipt of a disclosure statement constitutes a lease or an offer to lease.

**34 Notice of material changes**

If the lessor has given the tenant a disclosure statement for a lease and becomes aware of a significant change in the information in the statement before the tenant has signed or extended the lease or entered into possession of the premises, the lessor must quickly tell the tenant of the change in writing.

**35 Notice about handbook**

- (1) The lessor must tell the tenant about the approved handbook—
  - (a) if the lease is a change of use lease—as soon as practicable after the change of use; or
  - (b) in any other case—as early as practicable in negotiations for the lease (but in any case not later than when the lease is entered into).
- (2) For subsection (1), the commissioner for fair trading may approve a handbook (the *approved handbook*) that helps lessors and tenants to understand this Act.

**36 False or misleading representations**

A party to negotiations for a lease (the *representer*) must not make a representation to another party to the negotiations in the course of the negotiations (including a representation made in a disclosure statement) that the representer knows, or should reasonably know, is false or misleading in a material particular.

**37 Compensation for negotiation misrepresentations**

- (1) This section applies if—
  - (a) a party to negotiations for a lease (the *representer*) makes a representation to another party to the negotiations (the *injured party*) during the negotiations (including a representation made in a disclosure statement) that the representer knows or should reasonably know is false or misleading in a material particular; and
  - (b) a lease is entered into because of the negotiations; and
  - (c) the injured party suffers damage because of the representation.
- (2) In addition to any other right the injured party may have, the representer is liable to pay reasonable compensation to the injured party for damage suffered because of the representation.

**38 Key money prohibited**

- (1) The lessor must not ask for or accept key money for—
  - (a) the grant of a lease; or
  - (b) the extension of a lease under an option; or
  - (c) the renewal of a lease; or
  - (d) the consent to an assignment, sublease or mortgage of a lease; or
  - (e) the assignment, sublease or mortgage of a lease.
- (2) If key money is accepted by the lessor in contravention of this section, the amount paid, or the value of the benefit given, to or at the direction of the lessor is recoverable as a debt owing by the lessor to the tenant.
- (3) Subsection (2) does not limit any other remedy of the tenant for the contravention.

## Part 7                      Bonds and guarantees

### 39      **Maximum level of bond**

- (1) The lessor must not require or accept as a bond an amount more than rent payable under the lease for any 3 month period nominated by the lessor.
- (2) If the lessor requires payment of more than 3 months rent in advance, any advance payment over 3 months rent is taken, for this section, to be bond.

### 40      **Guarantees and indemnities**

The lessor may accept a guarantee, indemnity or both for the performance of the tenant's obligations under the lease as well as, or instead of, a bond.

### 41      **Bank guarantee as bond**

The lessor must not unreasonably refuse to accept a bank guarantee in satisfaction of a requirement to provide a bond.

### 42      **Dealings with bonds**

If the lessor requires the tenant to pay a bond—

- (a) the bond must be held by the lessor in trust for the tenant in an account that attracts interest; and
- (b) the lessor must account to the tenant for interest earned on the bond, but the lessor is entitled to keep the interest and deal with it as an amount paid by the tenant to the lessor as part of the bond; and
- (c) the lessor may only use the bond money in accordance with section 43.

### 43 Deductions from bonds

The lessor may deduct an amount from a bond paid for a lease only if the amount is owed to the lessor under the lease and deduction of the amount is not contrary to this Act.

**Examples of deductions from the lease that are not contrary to this Act**

- 1 the cost of repairs to, or the restoration of, the premises, or goods leased with the premises, necessary because of damage (other than fair wear and tear) caused by the tenant
- 2 rent in accordance with the lease and recoverable outgoings
- 3 interest, at a reasonable rate, on an amount payable by the tenant but not paid
- 4 a reasonable amount (that is not more than the costs incurred) for the cost of any legal fees incurred by the lessor in assigning or transferring the tenant's rights under a lease
- 5 the amount of insurance premiums payable by the tenant but not paid.

*Note to examples* **Recoverable outgoings** are outgoings recoverable under s 70 (see dict).

### 44 Repayment of bonds

- (1) This section applies if—
  - (a) the lessor has required a bond from the tenant; and
  - (b) the tenant has provided the bond; and
  - (c) the lease is not being extended under an option.
- (2) The lessor must give the tenant the bond and the interest earned on it, less any amount deducted by the lessor in accordance with this Act, not later than 30 days after the later of the following:
  - (a) the end of the lease;
  - (b) the tenant vacating the premises.

### 45 Return of guarantees

- (1) This section applies if—

- (a) the lessor has required a guarantee to secure the tenant's obligations under the lease; and
  - (b) the guarantee is not part of the lease; and
  - (c) the lease is not being extended under an option; and
  - (d) the tenant has performed the obligations secured by the guarantee.
- (2) The lessor must return the guarantee document to the tenant not later than 30 days after the later of the following:
- (a) the end of the lease;
  - (b) the tenant vacating the premises.

## **Part 8**                      **Rent**

### **Division 8.1**            **General**

#### **46**    **Discretionary rent review**

A discretionary rent review clause in a lease is void.

#### **47**    **Frequency of rent reviews**

- (1) A lease provision is void if it allows a change to be made to rent more than once in each 12 month period after the first anniversary of the commencement of the lease.
- (2) However, subsection (1) does not affect—
  - (a) a sublease provision that allows the sublessor to pass on to the subtenant an increase in the rent of the head lease; or
  - (b) a provision that sets out the steps (whether by amount or percentage) that rent will increase by at predetermined times during the lease; or
  - (c) a provision that allows a change to be made to rent directly or indirectly attributable to GST; or
  - (d) a provision that allows abatement of rent; or
  - (e) a provision that allows review of rent on the exercise of an option to extend the lease; or
  - (f) an adjustment to turnover rent allowed under section 63 (Frequency of adjustments to turnover rent).

#### **48**    **Commencement of payment for rent**

The tenant may pay or provide, and the lessor may request or accept payment for, rent only if—

- (a) the rent relates to a period from or after the handing over of possession of the premises; and
- (b) unless otherwise agreed, any finish required under the lease to be provided by the lessor has been substantially provided.

#### **49 Rent setting or review if lease method void**

- (1) The rent under a lease is market rent if—
  - (a) the provision of the lease that provides the method of setting or reviewing rent under the lease is void because of section 46 (Discretionary rent review); and
  - (b) the lessor or tenant has given the other party to the dispute written notice that the method is void; and
  - (c) the parties cannot, within 14 days after the notice is served, agree on an alternative basis for setting or reviewing the rent that would not be void if it were a provision in the lease.
- (2) For subsection (1), the parties may use mediation to try to agree on an alternative basis of setting or reviewing the rent.
- (3) Subsection (2) does not prevent the parties from using any other method to try to reach agreement.

#### **50 Lease to state date rent review due**

No change may be made to rent, and any purported rent change is void, if the lease does not—

- (a) state the date each rent review is due; or
- (b) provide a mechanism so the date of each rent review can be easily worked out.

#### **51 Rent on renewal**

- (1) This section applies if—
  - (a) either—

- (i) the lessor proposes to renew the lease and makes an offer to the tenant to renew the lease in response to a request under section 107 (Lessor's intentions about renewal); or
  - (ii) the lessor gives the tenant preference under section 108 (Rules of conduct at end of lease term for shopping centre leases) by making an offer to the tenant to renew the lease; or
- (b) the lessor otherwise makes a renewal offer to the tenant within 12 months after the end of the existing lease.
- (2) The lessor must not propose that the rent to be charged initially under the renewed lease exceed the market rent for the premises (other than under an option to renew contained in the lease).
- (3) In this section, a proposal or offer to renew the lease does not include an option to renew contained in the lease.

## **52     Market rent—rent reviews, options and renewals**

- (1) Subsection (2) applies in relation to a lease if—
  - (a) the lease states that market rent is to be charged for premises; or
  - (b) market rent is to be charged for the premises because of section 49 (Rent setting or review if lease method void).
- (2) The lessor or tenant may ask the Magistrates Court to refer a dispute about market rent for the lease for mediation if the lessor and tenant cannot agree on the market rent for the premises within 14 days after either tells the other that it disputes the proposed rent.
- (3) The lessor or tenant may also ask the Magistrates Court to refer a dispute about the rent to be paid under a renewal to mediation if—
  - (a) the lessor—
    - (i) either—

- (A) proposes to renew the lease and makes an offer to renew the lease in response to a request under section 107 (Lessor's intentions about renewal); or
  - (B) gives the tenant preference under section 108 (Rules of conduct at end of lease term for shopping centre leases) by making an offer to the tenant to renew the lease; or
- (ii) otherwise makes a renewal offer to the tenant before the end of 12 months after the end of the existing lease; and
- (b) the tenant accepts the lessor's offer to renew the lease subject to the rent for the lease being market rent.
- (4) On request under subsection (2) or (3), the Magistrates Court must—
    - (a) if the court considers that mediation would not be productive or if the parties agree—after consultation with the parties, appoint a valuer to work out the market rent; or
    - (b) refer the dispute to a mediator for mediation.
  - (5) If the Magistrates Court refers a dispute for mediation, the mediator must report the result of the mediation to the court not later than 28 days after the dispute was referred.
  - (6) If the mediator reports to the Magistrates Court that the parties to the lease cannot agree on the market rent, the court must, after consultation with the parties, appoint a valuer to work out the market rent.
  - (7) In this section, a proposal or offer to renew the lease does not include an option to renew contained in the lease.

### **53 Valuation to work out market rent**

- (1) A valuer appointed under section 52 to work out market rent must report to the Magistrates Court within 28 days after the appointment.

- (2) On receiving a report from the valuer, the Magistrates Court must give the parties to the lease a copy of the report.
- (3) The market rent worked out by the valuer is the rent under the lease if the parties fail to agree on a different rent to be charged within 14 days after being given a copy of the valuer's report.
- (4) If the parties to a lease enter into an interim agreement about renewing or extending the lease—
  - (a) the lessor cannot withdraw the offer to renew or extend; and
  - (b) the tenant cannot withdraw the acceptance of the offer.
- (5) However, subsection (4) does not apply if the parties agree, after the interim agreement is entered into, that the offer or acceptance may be withdrawn.
- (6) For subsections (4) and (5), an interim agreement is entered into if the tenant has accepted the lessor's offer to renew or extend the lease subject to the rent being market rent and, under section 52 (3), requested the Magistrates Court to refer a dispute about the rent for mediation.

#### **54 Working out market rent**

A valuer working out the market rent for premises must work out the market rent in accordance with schedule 1.

#### **55 Rent pending valuation—rent reviews and options to extend**

If the rent for premises is not worked out under section 52 (Market rent—rent reviews, options and renewals) or 53 (Valuation to work out market rent) before the extension of the lease is to commence or a rent review is due (the *relevant date*)—

- (a) the rent continues at the rate charged immediately before the relevant date until the rent has been worked out; and

- (b) once the rent has been worked out and set, the party who owes the other party the difference between the rent paid and the rent that should have been paid must pay the difference to the party owed within 30 days after the rent is set.

## **56 Extension if rent on renewal to be worked out**

- (1) This section applies if—
  - (a) the rent to be charged under a renewed lease is being worked out under section 52 (Market rent—rent reviews, options and renewals); and
  - (b) the lease that is being renewed (the original lease) expires before the rent has been worked out.
- (2) The original lease is taken to continue on the same terms until 14 days after the rent for the renewed lease is worked out and the parties are told about it.

## **57 Appointment of new valuer if conflict of interest disclosed**

- (1) If a valuer appointed to work out the market rent for a lease has an interest that could conflict with the proper working out of the market rent for the lease, the valuer must tell the parties to the lease and the Magistrates Court, in writing, about the conflict (including details of the conflict) within 5 days after being appointed to work out the rent.
- (2) A party who has been told of a conflict may, within 14 days after being told, apply to the Magistrates Court for the appointment of a new valuer.
- (3) On application under subsection (2), the Magistrates Court may disqualify the valuer and appoint a new valuer.
- (4) For this section, the valuer is taken to have an interest that could conflict with the proper working out of the market rent for the lease if the valuer has or has recently had an interest, whether direct or

indirect, in commercial property ownership or commercial property management.

- (5) Subsection (4) does not limit the circumstances in which the valuer has an interest that could conflict with the proper working out of the market rent for the lease.

### **58 Appointment of new valuer in other cases**

- (1) A party to a lease may apply to the Magistrates Court for the appointment of a new valuer if the party has reasonable grounds for believing that—
- (a) the valuer appointed to work out the market rent for the lease has failed to comply with section 57; or
  - (b) the valuer has failed to conduct a valuation in accordance with this Act.
- (2) On application under subsection (1), the Magistrates Court may disqualify the valuer and appoint a new valuer.

### **59 Disclosure of concessions**

- (1) If a valuer working out market rent under this Act asks the lessor for information about any relevant concession the lessor has given to another tenant, the lessor must give the valuer the information.
- (2) If the lessor complies with subsection (1), the lessor—
- (a) is not taken to have committed a breach of confidence or contract by complying with the subsection; and
  - (b) is not required to provide information that is otherwise readily available to the valuer.

### **60 Costs of valuations**

- (1) The costs of a valuation carried out for this part must—
- (a) be paid by or apportioned between the parties as the Magistrates Court directs; or

- (b) if the court does not give a direction—be shared equally between the parties.
- (2) In deciding whether it is appropriate to give a direction, the Magistrates Court must consider the following:
  - (a) the reasonableness of the actions of each party;
  - (b) if the valuer has been disqualified—whether the valuer should be paid in full, in part or not at all.

## **Division 8.2                      Turnover rent**

### **61            Combination of base and turnover rent acceptable**

The lessor may charge a combination of base rent and turnover rent.

### **62            Adjustments to turnover rent**

- (1) A lease that provides for the payment of turnover rent must include a provision to the effect that, within 1 month after receiving a written request by the lessor or tenant for an adjustment, an underpayment or overpayment of turnover rent resulting from actual turnover differing from estimated turnover must be adjusted by the other party.
- (2) If a party makes a request under subsection (1), the party must provide the party to whom the request was made with any information reasonably required to make the adjustment.

### **63            Frequency of adjustments to turnover rent**

Unless the parties to a lease otherwise agree, a party may make a request under a provision included in a lease because of section 62 for adjustment of turnover rent—

- (a) only once in the first year of the lease term; and
- (b) at intervals of not less than 1 year after the first request for an adjustment under the lease.

## **64 Working out turnover rent**

In working out turnover rent under a lease, the lessor or tenant must take into account the amount of the tenant's turnover, less the following amounts:

- (a) the amount of a loss incurred in the resale or disposal of goods reasonably purchased in the ordinary course of business from a customer as a trade-in;
- (b) deposits and instalments received for a lay-by, hire-purchase or credit sale, that are refunded to a customer;
- (c) refunds on a transaction if the proceeds of the transaction have been included as part of turnover;
- (d) service, finance or interest charges payable by the tenant to a financier in relation to the provision of credit to customers other than commissions on credit or store cards;
- (e) the price of merchandise exchanged between premises of the tenant if the exchange is made only for the convenient operation of the tenant's business and not to conclude a sale made at, in, from or on the leased premises;
- (f) the price of merchandise returns to shippers, wholesalers or manufacturers;
- (g) the proceeds of sale of the tenant's fixtures and fittings after their use in the conduct of the business at or from the premises;
- (h) a discount allowed to a customer in the course of business;
- (i) written-off uncollected credit accounts;
- (j) an amount directly or indirectly attributable to GST;
- (k) the net amount paid or payable by the tenant directly or indirectly attributable to a purchase tax, receipt tax or other similar tax imposed at the point of sale or hire of goods or services;
- (l) delivery charges;

- (m) proceeds of goods sold on consignment, other than a commission kept in relation to a sale;
- (n) sales of lottery and similar tickets, other than commissions.

## Part 9 Outgoings

### 65 Outgoings—estimates and expenditure statements

- (1) A lease that provides for payment of outgoings by the tenant must include a provision requiring the lessor—
  - (a) to give the tenant a written estimate (an *estimate*) of the outgoings the tenant is required to contribute to under the lease at least 1 month before the start of each accounting period of the lessor during the term of the lease; and
  - (b) to make a written expenditure statement (a *statement*) available for examination by the tenant within 1 month after the end of the accounting period it relates to.
- (2) The estimate must itemise the outgoings using the same item descriptions used in the list of outgoings in the disclosure statement.
- (3) The statement must contain details of expenditure by the lessor for outgoings to which the tenant contributes and must itemise the outgoings using the same item descriptions used in the list of outgoings in the disclosure statement.

### 66 Outgoings—reports

- (1) A lease that provides for payment by the tenant for outgoings must include—
  - (a) a provision requiring the lessor to give the tenant a written report (a *report*) within 3 months after the end of the accounting period the report relates to; and
  - (b) provisions to the effect of subsections (2) to (4).

- (2) A report must—
- (a) be prepared by an auditor on a cash accounting basis unless the disclosure statement or lease provides for another accounting method (for example, accrual accounting) to be used; and
  - (b) contain details of the lessor's spending on outgoings that the tenant contributed to in the accounting period; and
  - (c) include a statement by the auditor about whether or not—
    - (i) the outgoings the tenant contributed to were recoverable outgoings; and
    - (ii) the outgoings the tenant contributed to (that is, the estimated spending by the lessor on outgoings for the lease) was more than the amount spent by the lessor on outgoings in the accounting period.
- (3) A report may relate to more than 1 tenant provided that each tenant it relates to can work out from the report whether or not the amounts paid by the tenant in relation to outgoings were recoverable outgoings.
- (4) A report need not comply with subsection (2) (a) and (c) if—
- (a) the report only relates to any or all of the following outgoings:
    - (i) water, sewerage and drainage rates and charges;
    - (ii) other rates and statutory charges;
    - (iii) insurance;
    - (iv) a contribution paid to a corporation in accordance with a determination under the *Unit Titles Act 1970*, section 39, to the extent that the contribution is used, or is to be used, for an outgoing mentioned in subparagraphs (i) to (iii); and

- (b) the report is accompanied by—
  - (i) copies of receipts for all expenditure by the lessor mentioned in paragraph (a) (i) to (iii); and
  - (ii) if the report relates to an outgoing mentioned in paragraph (a) (iv)—a copy of the minutes of the owners corporation that state the extent to which the contributions to the general fund are to be, or have been, used for an outgoing mentioned in paragraph (a) (i) to (iii), or equivalent evidence of the use of the contributions.

## **67 Adjustment of contributions to outgoings**

- (1) If a lease requires the tenant to contribute to outgoings, the lease must include a provision to the effect that, within 3 months after the end of each period for which the tenant contributes to outgoings under the lease (the *payment period*), there must be an adjustment between the lessor and the tenant to take account of an underpayment or overpayment (if any) by the tenant in relation to the outgoings.
- (2) The lease must also provide that the adjustment is the difference between—
  - (a) the amount paid by the tenant for the estimated expenditure by the lessor on outgoings during the payment period; and
  - (b) the amount spent by the lessor for recoverable outgoings during the payment period to the extent that the lessor properly and reasonably incurred the expenditure.
- (3) If the lessor is using an accrual method of accounting, a reference in subsection (2) (b) to the amount spent by the lessor during a period includes a reference to a debt accrued by the lessor during the period.

**68 Methods of accounting**

- (1) If a lease requires accounts to be produced for outgoings, the lease may include a provision (a *method provision*) stating whether the accounts must be produced using a cash or accrual method of accounting.
- (2) If the lease does not include a method provision, accounts for outgoings under the lease must be produced using a cash method of accounting until the lessor tells the tenant otherwise in writing.

**69 Commencement of payment for outgoings**

The tenant may pay or provide, and the lessor may request or accept payment for, outgoings only if—

- (a) the outgoings relate to a period from or after the handing over of possession of the premises; and
- (b) unless otherwise agreed, any finish required under the lease to be provided by the lessor has been substantially provided.

**70 Recoverable outgoings**

- (1) The lessor may only recover the following outgoings in relation to leased premises from the tenant:
  - (a) an amount that is a reasonable expense directly related to the operation of, or a reasonable expense of repairing or maintaining—
    - (i) for premises located in the retail area of a shopping centre—an area used for or in connection with the retail area of the shopping centre that contains the premises; or
    - (ii) in any other case—the building that contains the premises;
  - (b) rates, taxes, levies or other statutory charges payable by the lessor because the lessor is the lessor or occupier of the

building that contains the premises, or the lessor of the land on which the building is located;

- (c) in relation to premises located in the retail area of a shopping centre—an amount that is a reasonable cost of promoting the premises or centre;
  - (d) an outgoing for expenditure incurred in obtaining statistical information.
- (2) However, if the accounting system used by the lessor is a cash accounting system, the lessor may only recover from a tenant an outgoing mentioned in subsection (1) (a) or (b) if the expenditure is made during the term of the lease.
- (3) Also, a lessor may not recover an outgoing from a tenant in relation to premises if the lessor has already recovered the outgoing from a previous tenant of the premises under a different accounting system.
- (4) Further, subsection (1) (a) (ii) does not allow the lessor to recover from the tenant an outgoing in relation to premises that are usually leased but are currently unleased.

## **71 Recovery of outgoings**

The tenant under a lease is liable to pay an amount to the lessor for outgoings only if—

- (a) the nature of the outgoings was stated in the disclosure statement provided to the tenant; and
- (b) the lease states—
  - (i) the outgoings that may be recovered by the lessor; and
  - (ii) how the amount of the outgoings will be worked out and apportioned to the tenant; and
  - (iii) how the outgoings or part of them may be recovered by the lessor from the tenant; and
- (c) the outgoings are recoverable outgoings.

**72 Retail areas of shopping centres—waiving auditor’s report**

- (1) If a majority of the tenants in the retail area of a shopping centre agree to waive the requirement for the preparation of an auditor’s report dealing with outgoings for a provision included in a lease because of section 65 (Outgoings—estimates and expenditure statements), the lessor is not required to provide an auditor’s report under that provision for any tenant in the shopping centre—
  - (a) for the period agreed by the tenants; or
  - (b) if no period is agreed by the tenants—for the accounting period in which the agreement is reached and subsequent accounting periods, until a majority of the tenants agree otherwise.
- (2) For subsection (1)—
  - (a) a tenant is not taken to have agreed to waive the requirement for the preparation of an auditor’s report only because the lease includes a term agreeing to the waiving of the requirement; and
  - (b) to work out whether a majority of the tenants agree to waive the requirement for the preparation of an auditor’s report, 1 vote is counted for each lease for premises in the retail area of the shopping centre.

## **Part 10**                      **Building alterations and related matters**

### **73**    **Employment restriction**

- (1) A lease provision is void if it limits, or has the effect of limiting, a tenant's right to employ people chosen by the tenant.
- (2) Subsection (1) does not prevent a lease containing provisions to the effect of any of the following:
  - (a) a provision specifying reasonable minimum standards of competence and behaviour for people employed on the premises or others (such as contractors) working on the premises;
  - (b) a provision prohibiting work being carried out on named property of the lessor;
  - (c) a provision requiring the tenant to comply with the requirements of an industrial award, industrial agreement or enterprise agreement (for example, a construction site agreement) affecting the shopping centre containing the premises.

### **74**    **Refurbishment of premises**

A lease provision is void if it requires the tenant to refurbish or refit premises, but does not give the details necessary to generally indicate the nature, extent and timing of the refurbishment or refit.

### **75**    **Undisclosed contributions**

A lease provision is void if it requires the tenant to pay for or contribute towards the cost of a finish, fixture, fittings, equipment or service, unless the requirement to make the payment or contribution was in the disclosure statement.

**76 Capital costs**

A lease provision is void if it requires the tenant to pay an amount for the capital costs—

- (a) of the building containing the leased premises; or
- (b) for premises in the retail area of a shopping centre—of a building in the shopping centre or an area used in association with a building in a shopping centre.

**77 Depreciation**

A lease provision is void if it requires the tenant to pay an amount for depreciation.

**78 Demolition**

A lease that provides for termination of the lease because of the proposed demolition of the building containing the premises must include provisions to the effect of all of the following:

- (a) the lease cannot be terminated because of the proposed demolition unless the lessor has given the tenant sufficient details of the proposed demolition to indicate a genuine proposal to demolish the building within a reasonable time after the lease is to be terminated;
- (b) the lease cannot be terminated by the lessor because of the proposed demolition unless—
  - (i) if the lease is for a term of up to 1 year—the lessor has given the tenant at least 3 months written notice of the lessor's intention to terminate; or
  - (ii) in any other case—the lessor has given the tenant at least 6 months written notice of the lessor's intention to terminate;
- (c) if the lease is terminated because of the proposed demolition before the end of the term of the lease—the lessor must pay the

tenant reasonable compensation for any loss of the tenant arising from the termination of the lease whether or not the lessor goes ahead with the demolition of the building;

- (d) in working out reasonable compensation for paragraph (c), regard must be had to any concession given to the tenant (for example, reduced rent) because of the existence in the lease of the clause allowing for termination because of the proposed demolition.

## **79 Alterations and refurbishments to or affecting premises**

- (1) Subject to section 80, the lessor must tell the tenant about alterations to, or the refurbishment of, the shopping centre or building containing the tenant's premises if the tenant is likely to be materially affected by the alterations or refurbishment.
- (2) The lessor is taken to have told the tenant about an alteration or refurbishment if notice of the alteration or refurbishment—
  - (a) is in writing; and
  - (b) includes details of the proposed alterations or refurbishment and the measures (if any) that will be taken by the lessor to minimise the effect of the alterations or refurbishment on the tenant's premises; and
  - (c) is given to the tenant at least 2 months before the alteration or refurbishment starts.

## **80 Emergency alterations**

If an alteration or refurbishment results from an emergency, the lessor must give the affected tenant notice of the alteration or refurbishment that is reasonable in the circumstances.

**81 Compensation for disturbance**

- (1) The lessor is liable to pay the tenant reasonable compensation for loss or damage (other than nominal loss or damage) suffered by the tenant if the lessor—
- (a) materially inhibits access by the tenant to the premises; or
  - (b) takes action that would materially inhibit or alter the flow of customers to the premises; or
  - (c) fails to fix a breakdown of plant or equipment under the lessor's care and maintenance as soon as practicable; or
  - (d) for premises located in the retail area of a shopping centre—does not adequately clean, maintain or repair the shopping centre (including common areas); or
  - (e) otherwise adversely affects the trade of the tenant by the lessor's conduct without reasonable cause, whether by act or omission.
- (2) The lessor is not liable to pay the tenant compensation in relation to an action of the lessor mentioned in subsection (1) (a) or (b) if—
- (a) the action was a reasonable response to an emergency or in compliance with a statutory requirement or a lawful direction of a government entity; and
  - (b) the emergency was not caused by, or the requirement or lawful direction did not apply because of, any neglect or failure of the lessor.

**82 Compensation to reflect any concessions**

In working out reasonable compensation for section 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.

**83 Shopping centre enlargement not grounds for compensation**

A tenant of premises in the retail area of a shopping centre is not entitled to compensation under section 81 (Compensation for disturbance) only because—

- (a) the shopping centre is enlarged; or
- (b) there is a change in the mix of tenants who hold leases in the shopping centre.

**84 Damaged premises unable to be used**

- (1) This section applies if—
  - (a) leased premises are, or the building containing the premises is, damaged; and
  - (b) the premises cannot be used for their normal purpose because of the damage.
- (2) The tenant is not required to pay rent or outgoings under the lease while the premises cannot be used unless the Magistrates Court decides otherwise.
- (3) The lessor may apply to the Magistrates Court for an order for payment (in full or in part) of rent or outgoings if—
  - (a) the damage to the premises or building was caused (fully or partly) by an act or omission of the tenant; or
  - (b) the lessor is unable to claim insurance for the damage because the tenant has invalidated the lessor's insurance.
- (4) This section does not apply to the extent (if any) to which the lessor and tenant agree to the payment, or reduced payment, of rent or outgoings after the premises are, or the building is, damaged.

**85 Damaged premises able to be used**

- (1) This section applies if—
  - (a) leased premises are, or the building containing the premises is, damaged; and
  - (b) the tenant can use the premises (fully or in part) for their normal purpose despite the damage.
- (2) The tenant must not refuse to pay rent or outgoings while the premises are, or the building is, damaged unless the Magistrates Court decides otherwise.
- (3) The tenant may apply to the Magistrates Court for an order for payment of a lower amount of rent or outgoings than is required by the lessor.
- (4) This section does not apply to the extent (if any) to which the lessor and tenant agree to the payment, or reduced payment, of rent or outgoings after the premises are, or the building is, damaged.

**86 Dispute about payment or nonpayment of rent and outgoings**

- (1) This section applies if—
  - (a) the lessor applies to the Magistrates Court about nonpayment under section 84 (Damaged premises unable to be used); or
  - (b) the tenant applies to the court about payment of rent under section 85.
- (2) The Magistrates Court may decide the application on its merits and is not bound by section 84 or 85.

**87 Dispute about useability of damaged premises**

- (1) If there is a dispute about whether leased premises have been damaged, or the building containing the premises has been damaged, so that the leased premises cannot be used for their normal purpose, a party to the lease may apply to the Magistrates

Court for a declaration about whether the premises can or cannot be used for their normal purpose because of the damage.

- (2) For this section, premises can be used for their normal purpose if they can be used fully or partly for their normal purpose.
- (3) This section does not apply in relation to the use of premises during a period (if any) for which the lessor and tenant have agreed to the payment, or reduced payment, of rent or outgoings.

### **88 Notice of lessor's intentions regarding repair**

If leased premises are, or a building that contains the premises is, damaged in a material way, the lessor must tell the tenant in writing, within 2 months after the day, or last day, the damage happened—

- (a) that the lessor reasonably considers repair of the premises or building is impracticable, and intends not to repair the premises or building; or
- (b) that the lessor intends to repair or reinstate the premises or building between starting and finishing dates approximately stated in the notice.

### **89 Termination by lessor because of damage**

- (1) The lessor may terminate a lease by giving at least 30 days notice of his or her intention to terminate if—
  - (a) the premises have, or a building containing the premises (the *building*) has, been damaged; and
  - (b) the lessor has told the tenant under section 88 (a) that the lessor does not intend to repair the premises or building; and
  - (c) either—
    - (i) the premises or building has to be, or has been, demolished because of the damage; or
    - (ii) the damage extends to more than 50% of the premises or building; or

- (iii) it is impracticable for the lessor to repair or reinstate the premises or building, acting reasonably and promptly, within 1 year after the day, or last day, the damage happened; or
  - (iv) the premises cannot be used because of the damage, the lease is due to expire within 2 years after the day, or last day, the damage happened and the lease contains no option for extension.
- (2) No compensation is payable for termination under this section.

## **90 Termination by tenant because of damage**

- (1) The tenant may terminate a lease by giving at least 30 days notice of the tenant's intention to terminate if—
- (a) the premises have, or a building containing the premises (the *building*) has, been damaged in a material way; and
  - (b) either—
    - (i) the lessor tells the tenant under section 88 (a) (Notice of lessor's intentions regarding repair) that the lessor does not intend to repair the damage; or
    - (ii) the lessor tells the tenant under section 88 (b) that the lessor intends to repair or reinstate the premises or building (the *plan*) but unreasonably departs from, or takes no reasonable action in relation to, the plan; or
    - (iii) the premises will not be able to be used for their normal purpose within a reasonable period, or for more than 1 year, after the day, or last day, the damage happened.
- (2) No compensation is payable for termination under this section.

**91 Compensation for incomplete repair**

- (1) This section applies if—
  - (a) the lessor fails to comply with section 88 (Notice of lessor's intentions regarding repair); or
  - (b) the tenant relies on the lessor's advice under section 88 that the lessor intends to repair damage to premises or to a building containing the premises.
- (2) The lessor is liable to pay the tenant compensation for loss or damage (other than nominal loss or damage) suffered because of the lessor's failure—
  - (a) to comply with section 88; or
  - (b) to repair the premises within the period the lessor told the tenant the premises would be repaired, or within a reasonable time after the end of that period.

**92 Agreement to terminate**

Section 88 (Notice of lessor's intentions regarding repair), section 89 (Termination by lessor because of damage) and section 91 do not prevent the parties to a lease terminating the lease by agreement if—

- (a) the premises are, or a building containing the premises is, damaged or destroyed; and
- (b) the agreement is reached after the premises or building are damaged or destroyed.

## Part 11                      **Assignments, subleases and mortgages**

### **93      Provision of disclosure statement by tenant**

- (1) Before asking for the lessor's consent to assign or sublet a lease under section 95 (Request for consent to assignment, sublease or mortgage), the tenant must give a prospective assignee or subtenant a copy of the disclosure statement (if any) given to the tenant in relation to the lease, together with details of any material change that has happened in the information contained in the statement since it was given to the tenant.
- (2) Subsection (1) only requires a tenant to give details of a material change of which the tenant is aware or could reasonably be expected to be aware.

### **94      Lessor to provide disclosure statement**

If the tenant does not have, or have access to, a copy of a disclosure statement required to be given under section 93—

- (a) the tenant may ask the lessor to give the tenant a copy of the disclosure statement for the lease to allow the tenant to provide a copy to a proposed assignee or subtenant; and
- (b) the lessor must not, without reasonable excuse, fail to comply with the request within 14 days after receiving it.

### **95      Request for consent to assignment, sublease or mortgage**

If the tenant complies with section 93 (Provision of disclosure statement by tenant), the tenant may, in writing, ask the lessor to agree to—

- (a) the assignment of the lease; or

- (b) the grant by the tenant of a sublease for the premises; or
- (c) the mortgage of the lease.

## **96 Lessor may require relevant information and documents**

- (1) Within 14 days after receiving a request under section 95, or after a further period agreed by the parties, the lessor may, in writing, ask the tenant to provide the lessor with further information or documents.
- (2) If the tenant's request is for consent to an assignment or sublease, the lessor may only request any or all of the following information or documents:
  - (a) information about the financial standing of the prospective assignee or subtenant, including details of any approved finance of the prospective assignee or subtenant;
  - (b) information about the financial standing of any prospective guarantor for the prospective assignee or subtenant;
  - (c) a certificate of occupancy for the premises;
  - (d) information about the business skills of the prospective assignee or subtenant;
  - (e) information about the proposed use of the premises by the prospective assignee or subtenant;
  - (f) references relating to the ability of the prospective assignee or subtenant to operate the business, or proposed business, on the premises.
- (3) If the tenant's request is for consent to the mortgage of the lease, the lessor may only request any or all of the following information or documents:
  - (a) information about the identity and financial standing of the proposed mortgagee;

- (b) details of the loan or other obligation to be secured by the mortgage including, if applicable, the amount of the loan, the purpose to which it is proposed the loan amount be used, the term of the loan, the repayment schedule for the loan and the powers that may be exercised by the mortgagee under the mortgage.

## **97 Mortgages and head lessors**

- (1) This section applies if the lessor—
  - (a) receives a request from the tenant under section 95 (Request for consent to assignment, sublease or mortgage); and
  - (b) has a mortgagee, head lessor or both; and
  - (c) is required under the mortgage or head lease to obtain the consent of the mortgagee or head lessor to the assignment, sublease or mortgage of the lease.
- (2) The lessor must tell the lessor's mortgagee, head lessor or both that the request has been made and of the terms of the request as soon as practicable after receiving the request.
- (3) If the lessor's mortgagee or head lessor requires further information or documents that the lessor may request under section 96, the lessor must ask the tenant for the information or documents and give them to the person who required them.
- (4) If the lessor's mortgagee or head lessor refuses to consent to the tenant's request, the mortgagee or head lessor must tell the lessor and tenant in writing within 14 days after being told of the request, or after a further period agreed between the parties.
- (5) A refusal under subsection (4) must include the reason for refusal.
- (6) The lessor's mortgagee or head lessor is taken to have consented to the tenant's request if the mortgagee or head lessor fails to give the lessor and tenant written notice of consent or refusal to consent to the request by the latest of the following:

- (a) 14 days after being told of the request;
- (b) if the mortgagee or head lessor asked for information or a document under section 96—14 days after receiving the information or document;
- (c) if a further period has been agreed under subsection (4)—the end of that further period.

### **98 Unreasonable refusal by mortgagee or head lessor**

- (1) If the lessor's mortgagee or head lessor refuses to consent to the tenant's request under section 95 (Request for consent to assignment, sublease or mortgage), the lessor or tenant may, within 14 days after being given the refusal, apply to the Magistrates Court to have the refusal overturned.
- (2) The only ground for overturning a refusal is that the refusal is unreasonable.

### **99 Lessor's consent or refusal**

- (1) This section applies if the tenant makes a request under section 95 (Request for consent to assignment, sublease or mortgage).
- (2) The lessor must consent or refuse to consent to the request by written notice to the tenant within 28 days after receiving the request, or after a further period agreed between the parties, unless the lessor asks for further information or documents under section 96 (1) (Lessor may require relevant information and documents).

*Note* Sections 100 and 101 (Refusal to consent to mortgage of lease) set out the criteria for refusal to consent.

- (3) If the lessor asks for further information or documents, the lessor must consent or refuse to consent by written notice to the tenant within 21 days after receiving the information requested, or after a further period agreed between the parties.

- (4) However, the lessor is taken to have consented to the request if—
- (a) the lessor fails to give written notice of the lessor's consent or refusal to consent under subsection (1) or (2); and
  - (b) the head lessor or mortgagee (if any) has not given a refusal notice to the tenant under section 97 (Mortgagees and head lessors).
- (5) The Magistrates Court may, on application by the tenant, order the person in possession of the Territory lease for the land that includes the leased premises to present the lease to the registrar-general to allow endorsement of the assignment or sublease if—
- (a) the lessor is taken to consent to the request; and
  - (b) the Territory lease is necessary for registration.

#### **100 Refusal to consent to assignment or sublease**

- (1) The lessor may refuse consent to the assignment of a lease or granting of a sublease requested under section 95 (Request for consent to assignment, sublease or mortgage) only if it is reasonable in all the circumstances to do so.
- (2) For subsection (1), the lessor's refusal is taken to be reasonable if the lessor has reasonable grounds for believing that—
- (a) the prospective assignee or subtenant intends to use the premises for a purpose not allowed under the lease; or
  - (b) the prospective assignee or subtenant (taking into consideration information about any proposed guarantor for the assignee or subtenant) does not have the financial resources to run the business; or
  - (c) the tenant cannot produce a current certificate of occupancy for the premises; or
  - (d) the prospective assignee or subtenant does not have adequate skills to run the business; or

- (e) the prospective assignee or subtenant, or the business conducted by the prospective assignee or subtenant, will not be compatible with other tenants in the building containing the premises; or
  - (f) the tenant has failed to rectify a breach of the lease (other than a breach that has been waived by the lessor).
- (3) If the lessor withholds consent on a ground not mentioned in subsection (2), the lessor has the burden of establishing that refusal to consent is reasonable.
- (4) This section does not authorise anything that would, if it were not authorised, contravene the *Trade Practices Act 1974* (Cwlth), part 4.
- (5) In this section:  
*business* includes proposed business.

### **101 Refusal to consent to mortgage of lease**

The lessor may refuse to consent to the mortgage of a lease requested under section 95 (Request for consent to assignment, sublease or mortgage) only if the lessor has reasonable grounds for believing that the tenant—

- (a) is not financially sound; or
- (b) does not have the capacity to service the proposed loan; or
- (c) cannot otherwise meet the tenant's obligations under the mortgage.

### **102 Lessor may recover costs**

- (1) The lessor 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.
- (2) A request for recovery under subsection (1) must be made in writing within 6 months after the giving, or refusing, of consent to the assignment, sublease or mortgage.

- (3) If the tenant asks the lessor in writing to substantiate costs sought to be recovered, the lessor may not recover the costs until they are substantiated.

### **103 Tenant and guarantor released from liability**

The tenant and any guarantor of the tenant are released from further obligations under the lease if the lease is assigned under this part.

## **Part 12** Extension, renewal and termination of leases

### **Division 12.1** Extension

#### **104** Minimum 5 year lease

- (1) This section applies if—
  - (a) the total term for which a lease is entered into is less than 5 years; and
  - (b) the tenant was not, before entering into the lease, independently advised about the effect of this section; and
  - (c) an extension of the term of the lease would not be—
    - (i) inconsistent with the head lease under which the lessor holds the lease; or
    - (ii) unlawful.
- (2) The tenant has the right to the extension of the lease so that the total term of the lease is 5 years, subject to this section.
- (3) The tenant may, not later than 90 days before the end of the term of the lease—
  - (a) exercise the right of extension by written notice to the lessor; and
  - (b) either—
    - (i) ask the lessor to take reasonable steps to register the extended lease with the registrar-general; or
    - (ii) lodge a caveat on the title of the land that contains the premises under the *Land Titles Act* 1925, section 104 (Lodging caveats).

- (4) The lessor must take all reasonable steps to register the extended lease if asked to under subsection (3).
- (5) The extension of a lease under this section has no effect until the tenant has made a request or lodged a caveat under subsection (3).
- (6) For this section—
- (a) a tenant is taken to have been independently advised about the effect of this section if, before entering into the lease, the tenant was so advised by a lawyer who was not acting for, or nominated by, the lessor; and
  - (b) in the absence of evidence to the contrary, a written statement by a lawyer certifying that the lawyer has, at the request of the tenant, explained the effect of this section to the tenant and, in particular, that the giving of the certificate will result in the tenant being unable to use this section to increase the total term of the lease to 5 years, is conclusive evidence of the facts in the statement.
- (7) This section does not apply to—
- (a) a lease granted under an option to extend a previous lease if—
    - (i) there was no break in the entitlement of the tenant to possession of the premises; and
    - (ii) the option was granted by the earlier lease or by an agreement entered into before or at the same time as the earlier lease was entered into; or
  - (b) a change of use lease; or
  - (c) a continuous occupation lease.
- (8) In this section:
- total term***, for a lease, means the length of the term of the lease and—

- (a) any further term provided for by an agreement if the agreement was entered into before or at the same time the lease was entered into; and
- (b) any further term to which the tenant is entitled by an extension of the lease, if the option was conferred before or at the same time the lease was entered into.

### **105 Terms of extended leases**

- (1) This section applies if a lease is extended under section 104.
- (2) The lease has the same provisions as it had before the extension, subject to any change necessary because the lease has been extended, unless—
  - (a) the lessor and tenant agree otherwise; or
  - (b) the Magistrates Court orders otherwise.
- (3) The Magistrates Court may make an order varying the terms of the extension on application by a party to the lease made within 14 days after the tenant exercises the right to extend the lease.
- (4) The applicant must tell the other party about the application.
- (5) If the Magistrates Court makes an order varying the provisions of the extension, the variation takes effect on the day stated in the order or, if no day is stated, when the order is made.

## **Division 12.2 Renewal**

### **106 Objects of div 12.2**

- (1) The Legislative Assembly recognises that conflicts sometimes happen between a lessor's expectation that the lessor will be able to deal with the leased premises subject only to the terms of the lease and a tenant's expectations of reasonable security of tenure.
- (2) The objects of this division are to achieve an appropriate balance between reasonable but conflicting expectations and to ensure fair

dealing, as far as practicable, between lessor and tenant in relation to the renewal or extension of premises.

### **107 Lessor's intentions about renewal**

- (1) This section applies to all leases.
- (2) The tenant may, in writing, ask the lessor to tell the tenant whether the lessor intends to renew the lease if—
  - (a) for a lease for longer than 1 year—the lease is due to end in not less than 6 months and not longer than 1 year; or
  - (b) in any other case—the lease is due to end in not less than 3 months and not longer than 6 months.
- (3) If the lessor receives a request under subsection (2) on a day (the *request day*), the lessor must tell the tenant, in writing within 1 month after the request day, either that—
  - (a) the lessor proposes to renew the lease; or
  - (b) the lessor does not propose to renew the lease.
- (4) If the lessor fails to notify the tenant under subsection (3), the lease is extended by a period equal to the period starting 1 month after the request day and ending when the lessor gives the tenant a notice that, apart from being late, complies with subsection (3).

### **108 Rules of conduct at end of lease term for shopping centre leases**

- (1) This section applies to a lease for premises in the retail area of a shopping centre if the lessor proposes to re-lease the premises and the tenant wants to renew or extend the lease.
- (2) The lessor must allow the tenant to renew or extend the lease in preference to allowing other possible tenants to lease the premises.
- (3) The lessor must assume that the tenant wants to renew or extend the lease unless the tenant has told the lessor, in writing within

12 months before the end of the lease, that the tenant does not want to renew or extend the lease.

- (4) The lessor may offer to lease the premises to someone other than the tenant only if it would be substantially more advantageous to the lessor to lease the premises to the other person rather than renew or extend the term of the lease.
- (5) However, the lessor is not obliged to prefer the tenant under this section if—
- (a) the lessor reasonably wants to change the tenancy mix within the shopping centre; or
  - (b) the tenant has breached the lease substantially or persistently; or
  - (c) the lessor—
    - (i) does not propose to re-lease the premises within a period of at least 6 months after the end of the term of the lease; and
    - (ii) needs vacant possession of the premises during that period for the lessor's own purposes (but not to carry on a business of the same kind as the business carried on by the tenant at the premises).
- (6) Also, this section does not apply in relation to the lease if—
- (a) section 111 applies in relation to the lease; or
  - (b) if the lease is a sublease—the sublease is as long as the term of the head lease allows; or
  - (c) the lease arises when the tenant holds over after the end of an earlier lease with the consent of the lessor and the holding over is for 6 months or less; or
  - (d) the lease is excluded from this section under the regulations.

*Note* This Act does not apply to leases with a term of less than 6 months unless they are continuous occupation leases (see s 12 (2) (c)).

## 109 Implementation of preferential right

- (1) If the tenant has a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term of the lease, begin negotiations with the tenant for a renewal of the lease.

*Note* Renewal of a lease includes extension of the lease (see dict).

- (2) In particular, before agreeing to enter into a lease with someone else, the lessor must—
  - (a) make a written offer, expressed to be made under this section, to renew the lease with the tenant on terms no less favourable to the tenant than those of the lease proposed to be entered into with the other person; and
  - (b) provide the tenant with a copy of the proposed lease (as renewed or extended) and the disclosure statement or proposed disclosure statement required in relation to it.
- (3) If the lessor offers to renew the lease under this section—
  - (a) the offer remains open for the period stated in the offer (the *acceptance period*) or until its earlier acceptance; and
  - (b) the tenant must tell the lessor in writing within the acceptance period whether the tenant accepts the offer; and
  - (c) if the tenant does not tell the lessor in writing within the acceptance period that the tenant accepts the offer—the offer lapses.
- (4) The acceptance period must be a reasonable period (at least 10 business days) after the offer is made.
- (5) The negotiations must continue until—
  - (a) the tenant rejects an offer under this section (or the offer lapses); or
  - (b) the tenant tells the lessor in writing that the tenant does not want to continue negotiations for a renewal of the lease.

- (6) The negotiations must be conducted honestly.

### **110 Notice of absence of right of preference**

- (1) If the tenant does not have a right of preference, the lessor must, by written notice—
- (a) tell the tenant that the tenant does not have a right of preference; and
  - (b) explain why the tenant does not have a right of preference.

*Note* Section 107 (3) sets out the circumstances in which the tenant does not have a right of preference.

- (2) The lessor must give the notice to the tenant—
- (a) at least 6 months, but not more than 12 months, before the end of the term of the lease; or
  - (b) if the term of the lease is 12 months or less—at least 3 months, but not more than 6 months, before the end of the term.

### **111 Certified exclusionary clauses**

- (1) Section 108 may be excluded in relation to a lease by a certified exclusionary clause.
- (2) A certified exclusionary clause is a provision of a lease in relation to which a certificate signed by an independent lawyer is endorsed on the lease to the effect that—
- (a) before the lease was signed and at the tenant's request, the lawyer explained the effect of the provision and how section 108 would apply in relation to the lease if the lease did not include the provision; and
  - (b) the tenant told the lawyer that the tenant was not acting under coercion or undue influence in asking for or agreeing to the inclusion of the provision in the lease.
- (3) For this section, an independent lawyer is a lawyer who is not acting for the lessor.

## **112 Fair dealing between lessor and tenant about renewal of shopping centre lease**

- (1) If the lessor fails to comply with section 108 (Rules of conduct at end of lease term for shopping centre leases) in relation to premises in the retail area of a shopping centre and the tenant is prejudiced by the failure, the tenant may apply to the Magistrates Court.

*Note* Under s 52 (Market rent—rent reviews, options and renewals) the lessor or tenant may ask the Magistrates Court to refer a dispute about the rent to be paid under a renewal to mediation.

- (2) On application under this section, the Magistrates Court may make any order it considers appropriate.
- (3) Without limiting subsection (2), the Magistrates Court may—
  - (a) order the lessor to renew or extend the lease, or to enter into a new lease with the tenant, on terms approved by the court (but not to the prejudice of the rights of a third-party who has honestly acquired an interest in the premises); or
  - (b) order the lessor to pay compensation (not more than 6 months rent under the lease) to the tenant.

## **Division 12.3 Termination generally**

### **113 Other rights etc unaffected by termination**

- (1) The termination of a lease under division 12.4 (Termination by tenant) or division 12.5 (Termination by lessor) does not affect a right, privilege or liability existing under, or because of, the lease immediately before its termination.
- (2) Unless the parties otherwise agree (otherwise than by a provision of the lease), subsection (1) is not affected by—
  - (a) the lessor not contesting a termination notice under division 12.4; or
  - (b) the tenant agreeing to a termination under division 12.5 or not contesting a termination under that division; or

- (c) the termination of the lease by agreement between the parties (otherwise than by a provision of the lease).

#### **114 Termination by agreement**

Divisions 12.4 and 12.5 do not prevent the termination of the lease by agreement between the parties (otherwise than by a provision of the lease).

#### **115 Abandonment**

- (1) If the tenant abandons the premises, the lease terminates on abandonment.
- (2) If the tenant abandons the premises before the end of the lease, the lessor may apply to the Magistrates Court for—
  - (a) an order declaring the lessor's right to enter the premises to recover possession of them; and
  - (b) compensation for any damage caused to the lessor because of the abandonment, including the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to someone else.
- (3) In working out the amount of compensation that may be awarded under this section in relation to costs, the Magistrates Court must have regard to—
  - (a) when, apart from the abandonment, the lease would have ended; and
  - (b) whether the lessor would have incurred the costs at the end of the lease.
- (4) The lessor is not entitled to be compensated under this section for a loss that could reasonably have been avoided by the lessor.

- (5) This section does not limit any right of the lessor to enter abandoned premises without a declaration under subsection (2) (a).

**Example of when lessor may enter abandoned premises without declaration.**

As a reasonable response to an emergency situation.

## **Division 12.4 Termination by tenant**

### **116 Tenant's right to terminate extended lease**

- (1) If a lease is extended because of section 107, the tenant may terminate the lease by giving the lessor at least 1 month's written notice of termination at any time after the day the lease would have expired if it had not been extended.
- (2) Subsection (1) does not prevent a tenant from terminating a lease by giving less than 1 month's written notice of termination if the lessor agrees to accept less notice.

### **117 Right to terminate—no disclosure statement etc**

In addition to any other right the tenant has, the tenant may, within 3 months after the day the lease is entered into, terminate the lease by giving the lessor at least 14 days written notice of termination if the lessor—

- (a) fails to provide a disclosure statement; or
- (b) provides a disclosure statement that is false or misleading in a material particular; or
- (c) omits a material particular from a disclosure statement.

### **118 Failure to notify material change in disclosure statement**

In addition to any other right the tenant has, the tenant may, within 3 months after a lease is entered into, terminate the lease by giving the lessor 14 days written notice of termination if the lessor—

- (a) failed to tell the tenant under section 34 (Notice of material changes) of a material change in information provided in a disclosure statement relating to the lease; or
- (b) provided notice under that section that omitted a material particular or contained information that the lessor knew, or should reasonably have known, was false or misleading in a material particular.

### **119 Lessor may contest termination**

- (1) The lessor may, within 14 days after being served with a termination notice, contest the termination by application to the Magistrates Court.
- (2) The only ground for contesting a termination under this section is that—
  - (a) the lessor acted honestly and reasonably and ought reasonably to be excused for doing the thing that constituted the ground for termination under section 117 (Right to terminate—no disclosure statement etc) or section 118 (Failure to notify material change in disclosure statement); and
  - (b) the tenant is substantially in as good a position as the tenant would have been in had the lessor not done the thing.

### **120 Effect of uncontested termination notice**

If the lessor does not contest a termination notice within 14 days after the notice was served on the lessor, the notice takes effect 15 days after service.

### **121 Effect of contested termination notice**

Despite section 117 (Right to terminate—no disclosure statement etc) and section 118 (Failure to notify material change in disclosure statement), if a termination notice is contested under this part—

- (a) the notice does not have effect unless it is confirmed by the Magistrates Court; and
- (b) if the notice is confirmed—the notice has effect on the day stated by the court or, if no day is stated, on confirmation.

## **Division 12.5 Termination by lessor**

### **122 Procedure for termination of lease by lessor etc**

- (1) If the lessor has a right to terminate the lease, the lessor may give written notice of termination to the tenant (the *termination notice*).
- (2) Within 14 days after being given the termination notice (the *allowed period*), the tenant may—
  - (a) contest the termination by application to the Magistrates Court; or
  - (b) agree to the termination by written notice to the lessor.
- (3) The termination takes effect in accordance with the terms of the termination notice if, within the allowed period, the tenant—
  - (a) does not contest the termination by application to the Magistrates Court; or
  - (b) agrees to the termination by written notice to the lessor.
- (4) If the tenant contests the termination by application to the Magistrates Court within the allowed period—
  - (a) the termination does not have effect unless it is confirmed by the Magistrates Court; and
  - (b) if the termination is confirmed—it has effect on the day ordered by the court.
- (5) The lease may be terminated by the lessor only in accordance with this section.
- (6) If the tenant is in possession of the premises, the lessor may enter the premises to recover possession of the premises only—

- (a) under a court order or warrant; or
- (b) if the lease has been terminated in accordance with this section.

### **123 Confirmation of contested termination**

- (1) If the tenant applies to the Magistrates Court under section 122 to contest the termination of the lease by the lessor, the court may confirm the termination if satisfied that—
  - (a) a ground (the *termination ground*) exists for the lessor to terminate the lease; and
  - (b) the act or omission that gave rise to the termination ground (the *breach*) is an act or omission of the tenant or a subtenant; and
  - (c) the lessor had given the tenant notice of the breach and a reasonable opportunity to remedy it; and
  - (d) the termination ground justifies confirming the termination.
- (2) Without limiting what is a reasonable opportunity under subsection (1) (c), the tenant is taken to have been given a reasonable opportunity to remedy the breach of an obligation to pay an amount if the tenant is allowed 14 days to pay the amount.
- (3) However, the Magistrates Court may refuse to confirm the termination even if satisfied about the matters mentioned in subsection (1) if—
  - (a) the breach has been remedied; or
  - (b) the tenant gives an undertaking that the tenant will remedy the breach within 14 days.
- (4) The Magistrates Court may suspend the order confirming the termination for not longer than 21 days if satisfied that—
  - (a) the immediate operation of the order would cause significant hardship to the tenant; and
  - (b) the hardship to the tenant would be greater than the hardship that the suspension would cause to the lessor.

- (5) The Magistrates Court may suspend the order under subsection (4) only once.

## **124 Confirmation of uncontested termination**

- (1) This section applies if—
- (a) the lessor has given the tenant a termination notice under section 122 (1) (Procedure for termination of lease by lessor etc); and
  - (b) the tenant has not contested the termination, or agreed to the termination, under section 122 (2).

*Note* Under the *Legislation Act 2001*, s 247 (Service of documents on individuals), a document (for example, the termination notice) is taken to have been given to an individual (for example, the tenant) if it is sent by prepaid post, addressed to the individual, to a home or business address of the individual.

- (2) The lessor may apply to the Magistrates Court for confirmation of the termination.
- (3) The Magistrates Court may confirm the termination if it considers that the termination is reasonable in the circumstances.

## **125 Content of termination orders**

- (1) An order under section 123 (Confirmation of contested termination) or section 124 (Confirmation of uncontested termination) confirming the termination of the lease must state—
- (a) the day the lease is or was terminated; and
  - (b) if the tenant has not already vacated the premises—the following:
    - (i) that the tenant must vacate the premises on or before that day;
    - (ii) either—

- (A) that, if the tenant does not vacate the premises as required, the lessor may apply to the Magistrates Court for the issue of a warrant for the eviction of the tenant; or
  - (B) that, if the tenant does not vacate the premises as required, the order will have effect as if it were a warrant for eviction.
- (2) If the order states that it will have effect as if it were a warrant for eviction, the order must comply with section 126 as if it were a warrant for eviction under this division.

### **126 Content of warrants for eviction**

- (1) A warrant for eviction under this division in relation to a lease must—
- (a) authorise a designated officer to take appropriate action to evict the tenant within the time stated in the warrant; and
  - (b) require the designated officer to give the tenant at least 2 days notice of the proposed eviction.
- (2) The designated officer may ask a police officer to take action, or help the designated officer, to enforce the warrant.
- (3) For this section:

*designated officer* means someone responsible for taking action on warrants issued by the Magistrates Court.

### **127 Issue of warrants for eviction**

On application by the lessor, the Magistrates Court must issue a warrant for eviction in relation to the lease if—

- (a) the court has made an order under section 123 (Confirmation of contested termination) or section 124 (Confirmation of uncontested termination) confirming termination of the lease; and

- (b) the order stated that, if the tenant did not vacate the premises as required, the lessor could apply to the Magistrates Court for the issue of a warrant for the eviction of the tenant; and
- (c) the tenant did not vacate the premises as required and continues to occupy the premises in contravention of the order.

## **Part 13**                      **Retail areas of shopping centres**

### **128 Application of pt 13**

This part applies to leases for premises in the retail areas of shopping centres.

### **129 Provision and use of turnover figures**

- (1) The lessor must not require the tenant to supply periodic turnover figures unless the lease provides that rent is to be worked out by reference to turnover.
- (2) The lessor must not divulge or communicate a tenant's periodic turnover figures to anyone except—
  - (a) to the tenant or tenant's guarantor; or
  - (b) with the consent of the tenant or the tenant's guarantor; or
  - (c) in a document giving aggregate turnover information about a shopping centre or part of a shopping centre in a way that does not disclose information about the turnover of an individual tenant's business; or
  - (d) to a court or tribunal; or
  - (e) for mediation, a hearing or valuation for this Act; or
  - (f) in compliance with a requirement made under this or another law or an order of a court; or
  - (g) to the lessor's professional advisers (such as legal or financial advisers); or
  - (h) to a financial institution to allow the lessor to obtain or continue to receive financial accommodation or to comply with

a condition imposed by the financial institution in relation to a financial accommodation; or

- (i) honestly to a prospective purchaser of the shopping centre or part of the shopping centre.
- (3) A person who receives information under this section may only use the information for the purpose for which it was given and may not further disclose the information except with the tenant's consent.

### **130 Statistical information to be available to tenant**

If a lease requires the tenant to pay an amount for outgoings for expenditure incurred in obtaining statistical information, the lease must include a provision to the effect that the lessor must make the statistical analysis of the information obtained by the lessor available to the tenant in a form that does not identify a particular tenant.

### **131 Advertising and promotion levy—new leases**

- (1) This section applies to the lessor's first accounting period under a new lease, whether it is a full accounting period or the remainder of an accounting period.
- (2) If the lease requires the tenant to pay an amount to the lessor for advertising and promotion costs, the amount can be levied only if, before the lease was entered into, the lessor made available to the tenant a marketing plan giving details of the lessor's proposed expenditure on advertising and promotion during the accounting period or remainder of the accounting period.
- (3) If the lessor fails to substantially comply with subsection (2), the tenant is not liable to pay an amount for advertising and promotion costs and may recover any amount already paid for those costs.

### **132 Advertising and promotion levy—other leases**

- (1) This section applies to the lessor's accounting periods after the first accounting period under a lease.

- (2) If the lease requires the tenant to pay an amount to the lessor for advertising and promotion costs, the lessor can only levy the amount if—
- (a) at least 1 month before the start of each accounting period of the lessor—the lessor makes available to the tenant a marketing plan that gives details of the lessor’s proposed expenditure on advertising and promotion during the accounting period and indicates the amount (if any) previously levied for advertising or promotional purposes but not spent; or
  - (b) if the amount relates to an opening promotion for the relevant shopping centre—at least 1 month before the opening promotion, the lessor makes details of the proposed expenditure on the promotion available to the tenant.
- (3) If the lessor fails to substantially comply with subsection (2), the tenant is not liable to pay an amount for advertising and promotion costs and may recover any amount already paid for those costs—
- (a) for costs relating to an opening promotion of the shopping centre—if the details were not made available to the tenant in accordance with subsection (2) (b); or
  - (b) in any other case—if no expenditure plan has been provided.

### **133 Amount not spent to be kept for benefit of tenants**

An amount paid by the tenant for an advertising and promotion levy that is not spent within the lessor’s accounting period must be kept by the lessor in a fund for the benefit of tenants to be used for future expenditure on advertising or promotion of the shopping centre.

### **134 Non-specific outgoings contribution**

- (1) The tenant is only liable to contribute to an outgoing to the extent that it is referable to the tenant’s premises.
- (2) The tenant is not liable to contribute more than an amount calculated by multiplying the total amount of the outgoing by the ratio of the

lettable area of the tenant's premises to the total of the lettable areas of all the premises in the retail area of the shopping centre to which the outgoing is referable.

- (3) For this section, an outgoing is referable to premises if the premises benefit from, or share the benefit resulting from, the outgoing.

### **135 Consultation before redevelopment**

- (1) The lessor must not redevelop the shopping centre, or part of the shopping centre, unless the lessor has consulted with the tenants about the proposed redevelopment.
- (2) The lessor is taken to have consulted about a proposed redevelopment if the lessor conducts a meeting about the proposal and—
- (a) the tenants are invited to the meeting; and
  - (b) the lessor gives reasonable notice of the meeting; and
  - (c) the lessor distributes a written summary of the proposed redevelopment at or before the meeting; and
  - (d) the meeting takes place before a final decision is made to redevelop.
- (3) The lessor is taken to have consulted about a proposed redevelopment if—
- (a) the lessor gives a written summary of the proposed redevelopment to the tenants within a reasonable time before the decision is made to redevelop; and
  - (b) seeks submissions in relation to it.
- (4) For this section:
- redevelop**, for a shopping centre, means—
- (a) refurbish, if the refurbishment proposed is likely to cost more than 10% of the value of the shopping centre; or

- (b) substantially reconstruct the shopping centre; or
- (c) construct additional retail space at the shopping centre so that the lettable area of the shopping centre is increased by more than 10%.

*representative body* includes a body—

- (a) whether incorporated or not; and
- (b) whether specially created to consider the proposed redevelopment or not.

### 136 Relocation clauses

- (1) A lease that allows the tenant to be relocated within the shopping centre must include provisions to the effect of the following:
  - (a) if the lessor intends to relocate the tenant—the lessor must give the tenant at least 3 months written notice of the relocation (the *relocation notice*) and include an offer to provide alternative comparable premises (the *alternative premises*) for a period equivalent to the unexpired term of the existing lease on terms no less favourable than those applying to the premises originally leased;
  - (b) the tenant may give written notice to the lessor within 1 month after receiving the relocation notice of the tenant's intention to terminate the lease, and if the tenant does, the termination takes effect 3 months after the relocation notice was received by the tenant, unless the parties otherwise agree;
  - (c) if the tenant accepts the offer of the alternative premises made in the relocation notice—the lessor must give the tenant a new lease in accordance with the offer;
  - (d) the lessor must pay the tenant's reasonable costs of relocation and pay reasonable compensation to the tenant for any other loss or damage incurred by the tenant because of the relocation;

- (e) in working out what is reasonable compensation consideration must given to any concession given to the tenant, like reduced rent, because the lease contains a relocation provision.
- (2) In subsection (1):  
*comparable premises* include premises that have not yet been built.

**137 No relocation other than for repairs, refurbishment, redevelopment or extension**

A provision in a lease that allows the tenant to be relocated other than so the lessor can repair, refurbish, redevelop or extend the shopping centre is void.

**138 Relocation for repairs, refurbishment, redevelopment or extension**

- (1) The lessor must not use a provision of a lease that allows the tenant to be relocated within the shopping centre because of proposed repairs or a proposed refurbishment, redevelopment or extension unless—
  - (a) the proposed repairs, refurbishment, redevelopment or extension of the shopping centre that contains the tenant's premises cannot practicably be carried out without vacant possession of the tenant's premises; and
  - (b) the lessor presents the tenant with a plan for the repairs, refurbishment, redevelopment or extension.
- (2) If the lessor uses a provision of a lease that allows the tenant to be relocated within the shopping centre, the lessor must ensure that the proposed repairs, refurbishment, redevelopment or extension is carried out within a reasonable time after the relocation of the tenant.

**139 Changing core trading hours**

- (1) The lessor is not entitled to change the core trading hours of the shopping centre without the written approval of the majority of tenants of premises in the retail area of the shopping centre (whether or not the premises are premises to which this Act otherwise applies).
- (2) The initial fixing of core trading hours in a new shopping centre is not a change to core trading hours and is not affected by this section.

**140 Tenants trading outside core trading hours**

- (1) The tenant may trade outside the core trading hours of the shopping centre with the lessor's agreement provided that the tenant meets the costs associated with opening and operating the shopping centre for the additional hours, including any costs of advertising and promotion.
- (2) A cost met by the tenant under subsection (1) must be proportionate having regard to the costs of opening and operating the shopping centre and the number of other tenants who are trading outside the core trading hours with the tenant.

**141 Geographical restrictions void**

- (1) A provision of a lease that has the effect of preventing or restricting the tenant from carrying on business outside the shopping centre containing the tenant's premises during, or after the end of, the lease is void.
- (2) Subsection (1) does not prevent a lease from containing a provision that prevents the use of the name of a shopping centre in connection with a business carried on outside the shopping centre.

**142 No termination for inadequate sales**

A provision in a lease that allows the lessor to terminate the lease because the tenant or the business of the tenant has failed to achieve adequate or stated sales or turnover performance is void.

## Part 14 Dispute resolution

### 143 Definitions for pt 14

In this part:

*dispute*, in relation to an application, means the dispute to which the application relates.

*party*, to an application, means a party to the proceeding on the application.

### 144 Jurisdiction

- (1) The Magistrates Court has jurisdiction to decide applications under this Act.
- (2) The jurisdiction of the Magistrates Court for this Act is not affected by the amount claimed in an application.

### 145 Applications that may be made

An application may be made in relation to a dispute to which this Act applies.

*Note* Section 17 sets out the disputes to which this Act applies.

### 146 Timing of rental applications

- (1) An application by a tenant in relation to a rent increase must be made at least 28 days before the increase is proposed to take effect, unless the Magistrates Court waives this requirement.
- (2) However, the Magistrates Court may hear an application relating to a proposed rental rate increase made less than 28 days before the day the increase is proposed to take effect, if satisfied that—
  - (a) the application is late because of special circumstances; and

- (b) to hear the application would not place the lessor in a significantly worse position than the lessor would have been had the tenant applied at least 28 days before the day the increase is proposed to take effect.

#### **147 Action on receiving application**

- (1) The Magistrates Court must hold a case management meeting with the parties for each application it receives.
- (2) The purpose of the case management meeting is—
  - (a) to assess the likelihood of the parties resolving the dispute before the proceeding is heard; and
  - (b) to direct the hearing of the application as a result of the assessment.

#### **148 Resolution of dispute likely**

If, at a case management meeting for an application, the Magistrates Court considers it likely that the parties may resolve the dispute, the court—

- (a) must promote the settlement of the dispute (either at the meeting or by referral to other dispute resolution mechanisms); and
- (b) may adjourn the proceeding to a stated date, or for a stated period, to allow the parties to settle the dispute.

##### **Examples of other dispute resolution mechanisms**

- 1 mediation
- 2 conciliation
- 3 facilitation
- 4 early neutral evaluation
- 5 arbitration.

**149 Resolution of dispute unlikely**

- (1) If, at a case management meeting for an application, the Magistrates Court considers it unlikely that the parties may resolve the dispute, the court must give directions about how the proceeding will be conducted.
- (2) In deciding what direction to give for the proceeding, the Magistrates Court must endeavour to facilitate—
  - (a) hearing the dispute as quickly as possible; and
  - (b) keeping costs for the parties as low as practicable.

**150 Hearings**

The Magistrates Court must, when hearing a proceeding—

- (a) act as quickly as possible; and
- (b) ensure, as far as practicable, that all relevant material is disclosed to the court to allow it to decide the matters in dispute.

**151 Procedures**

- (1) The Magistrates Court may decide its own procedures.
- (2) Without limiting subsection (1), the Magistrates Court may adopt, either completely, in part or in a modified form, the procedures in the following parts of the *Magistrates Court (Civil Jurisdiction) Act 1982*:
  - (a) part 7 (Reply);
  - (b) part 8 (Third party procedures);
  - (c) part 10 (Payment into court);
  - (d) part 12 (Pleadings and particulars);
  - (e) part 13 (Interlocutory matters);
  - (f) part 15 (Evidence).

- (3) Without limiting subsection (1), the Magistrates Court may require evidence or argument to be provided in writing and may decide the matters on which it will hear oral evidence or argument.
- (4) If the Magistrates Court does not decide its own procedures, the procedures in the provisions of the *Magistrates Court (Civil Jurisdiction) Act 1982* mentioned in subsection (2) apply.

### **152 Transfer to Supreme Court**

The Magistrates Court may transfer a proceeding to the Supreme Court if the Magistrates Court considers it appropriate.

### **153 Notice of orders**

The Magistrates Court must give each party to a proceeding written notice setting out the terms of any order made at the end of the hearing within 14 days after making the order.

### **154 Costs**

The parties in a proceeding under this Act must bear their own costs unless the Magistrates Court or Supreme Court makes an order about costs.

### **155 Appeals**

- (1) A party to a proceeding under this Act may appeal to the Supreme Court on a question of law or fact from a decision of the Magistrates Court in the proceeding.
- (2) The appeal must be begun within 28 days (the *appeal period*) after notice is given to the person under section 153 (Notice of orders) or within the further time (the *further time*) allowed by the Supreme Court.
- (3) The Supreme Court may allow the further time before or after the end of the appeal period.

**156 Order by Supreme Court on appeal**

The Supreme Court may make any order it considers appropriate on an appeal under this Act, including the following orders:

- (a) an order affirming or setting aside the decision of the Magistrates Court;
- (b) an order remitting the case to the Magistrates Court to be heard again, either with or without the hearing of further evidence, in accordance with the directions of the Supreme Court.

## Part 15 Miscellaneous

### 157 References to repealed Act or code

- (1) In any Act, statutory instrument or document, a reference to the repealed Act or the code is, in relation to anything dealt with in this Act, a reference to this Act.
- (2) In any Act, statutory instrument or document, a reference to a particular provision of the repealed Act or code is, in relation to anything dealt with in this Act, a reference to the corresponding provision of this Act.
- (3) In this section:

*code* means the code of practice approved under the repealed Act, section 75 as in force immediately before commencement day.

*repealed Act* means the *Tenancy Tribunal Act 1994* as in force immediately before commencement day.

### 158 Regulation-making power

- (1) The Executive may make regulations for this Act.

*Note* Regulations must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

- (2) The regulations may—
  - (a) regulate the practice and procedures to be followed by the Magistrates Court; and
  - (b) provide for the exercise of the powers of the court under this Act to be exercised by the registrar and deputy registrars of the court; and
  - (c) provide that the words used in a lease, or a mortgage for leased premises, have a wider meaning than that set out in the lease or mortgage, and may prescribe the meaning.

## Part 16 Transitional

### 159 Definitions for pt 16

In this part:

*code* means the code of practice approved under the repealed Act, section 75 as in force immediately before commencement day.

*dispute* means a dispute within the meaning of the repealed Act.

*lease* means a lease within the meaning of the repealed Act.

*repealed Act* means the *Tenancy Tribunal Act 1994* as in force immediately before commencement day.

*tribunal* means the Tenancy Tribunal established by the repealed Act, section 60

*tribunal registrar* means the registrar of the tribunal.

### 160 Pre-existing referrals

- (1) This section applies if, immediately before commencement day, a person had referred a dispute to the tribunal registrar under section 12 of the repealed Act but the dispute had not been disposed of by the tribunal.
- (2) This Act applies to the dispute as if the dispute were an application under this Act.
- (3) This Act applies as if, for any step taken under the repealed Act in the proceeding on the dispute, the corresponding step under this Act had been taken in the proceeding on the claim.
- (4) Any evidence given in the proceeding on the dispute is to be taken to have been given in the proceeding on the claim.
- (5) If the dispute was a dispute mentioned in the repealed Act, section 6 (1) (b), this Act, section 22 (Prohibited conduct in

dealings) applies to the dispute as if the reference in section 22 (2) (g) to ‘the requirements of this Act’ were a reference to ‘the requirements of this Act or the *Tenancy Tribunal Act 1994* as in force immediately before commencement day’.

**161 Provisions required to be included—application to pre-existing leases**

A provision of this Act requiring a provision to be included in a lease does not apply to leases in force immediately before commencement day.

**162 Lessor’s intentions about renewal**

To avoid doubt, section 107 (Lessor’s intentions about renewal) also applies to leases entered into before the commencement of this Act.

**163 Preference to existing tenants**

Section 108 (Rules of conduct at end of lease term for shopping centre leases) only applies to a lease entered into after the commencement of this Act.

**164 Provisions taken to be included—application to pre-existing leases**

- (1) This section applies to a lease in force immediately before the commencement day if the lease contains a provision (the *lease provision*) dealing with the same subject as a provision (the *Act provision*) that, apart from this section, would be taken to be included in the lease because of section 20 (Included provisions).
- (2) The Act provision is taken to be included in the lease only to the extent that the Act provision is not inconsistent with the lease provision.

**165 Application of Act to disputes under code**

- (1) A party to a lease may apply to the Magistrates Court for resolution of a dispute, and the dispute must be dealt with for all purposes, as if it were a dispute under this Act if—
  - (a) immediately before the commencement day—
    - (i) a party to the lease engaged in conduct that gave rise to a dispute under the repealed Act, section 6 (1) (f) or (g) but the conduct had not been referred to the tribunal registrar as a dispute; and
    - (ii) the code applied to the lease and the conduct at the time the conduct happened; and
  - (b) the party could not, apart from this section, apply to the Magistrates Court for resolution of the dispute under this Act.
- (2) This section is subject to section 18 (Disputes about leases no longer in force).

**166 Approved handbook and pre-existing leases**

If a lease is in force immediately before commencement day, the lessor must tell the tenant about the approved handbook under section 35 (Notice about handbook) as soon as practicable after commencement day.

**167 Tribunal decisions**

A decision of the tribunal is taken to have been a decision of the Magistrates Court under this Act.

**168 Application of Act to leases code applied to**

- (1) This section applies to a lease in force immediately before the commencement day if the code applied to the lease at that time.
- (2) Despite part 3 (Application), this Act applies to the lease to the extent to which the code applied to the lease at that time.

### **169 Transitional regulations**

- (1) The regulations may prescribe savings or transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) Without limiting the scope of subsection (1), the regulations may prescribe matters necessary or convenient to be prescribed for carrying out or giving effect to the provision of this Act instead of the provisions of the repealed Act.
- (3) Regulations made for this section must not be taken to be inconsistent with this Act as far as they can operate concurrently with this Act.
- (4) This section is additional to, and does not limit, section 170.

### **170 Modification of pt 16's operation**

The regulations may modify the operation of this part to make provision with respect to any matter that is not already, or is not adequately, dealt with in this Part.

### **171 Expiry of pt 16**

This part expires 2 years after commencement day.

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## Schedule 1 Working out market rent

(see s 54)

- (1) Market rent, of premises, is the amount that could reasonably be expected to be paid in rent for vacant possession of the premises on the open market if—
  - (a) the premises were let by a willing but not anxious lessor to a willing but not anxious tenant; and
  - (b) both parties acted knowledgeably and prudently; and
  - (c) the use to which the premises may be put under the lease is taken into consideration; and
  - (d) the amount is worked out in accordance with this schedule.
- (2) The valuer must take into account the following in relation to the premises:
  - (a) the gross cost of occupancy;
  - (b) market evidence about comparable premises, including the level of incentives or inducements to lease (if any) being offered in the marketplace for comparable premises;
  - (c) the estimated gross occupancy costs that would be agreed, on valuation, between a willing lessor and a willing tenant in an arms length transaction, after proper marketing of the premises, if the parties acted knowledgeably, prudently and without compulsion;
  - (d) any covenant or restriction on the use of the premises or any covenant on adjacent premises that run with the premises;
  - (e) court precedents about valuation practice;
  - (f) the proposed arrangements for rent review;
  - (g) any building service or improvement offered by the lessor (other than a service or improvement that can be removed or

- withdrawn by an outgoing tenant or someone other than the people for whom market rent is being worked out);
- (h) the condition of the premises, as provided by the lessor;
  - (i) particulars required to be disclosed in a disclosure statement that affect or potentially affect the rental value of premises, including particulars about a tenant's obligations, costs or responsibilities;
  - (j) the terms of the lease or proposed lease;
  - (k) any other relevant market evidence.
- (3) The valuer must not take into account the following in relation to the premises:
- (a) a special interest or concern of the lessor or tenant;
  - (b) the tenant's goodwill;
  - (c) the tenant's fixtures and fittings;
  - (d) an advantage or disadvantage arising from the current lease agreement.
- (4) Subclauses (2) and (3) do not limit the matters that the valuer may take into account in relation to the premises.
- (5) A party to the lease may, on the party's own initiative, make a submission to the valuer within 14 days after the appointment of the valuer and, if the party makes a submission within that time, the valuer must consider the submission.
- (6) The valuer must, in writing, tell each party to the lease of the party's right to make a submission in relation to the valuation.
- (7) A notice must require the parties to make their submissions within 14 days after the date of the notice and tell the parties that, if they do not make a submission in that time, a valuation may be made without their submission.
- (8) The valuer may proceed with a valuation of a lease even if a party to the lease does not make the requested submission.

- (9) The valuation must give detailed reasons for the valuation and must include particulars of the matters that the valuer took into consideration in working out the valuation.
- (10) The valuation must include particulars of any concession or inducement disclosed to the valuer.
- (11) For this schedule:
- gross cost of occupancy*, for premises, means the rent for the premises, plus recoverable outgoings (other than promotional levies or advertising commitments required by the lease).

## Dictionary

(see s 4)

**accounting period**, for a lessor, means a financial year or other period included in a disclosure notice under section 31 (Form of disclosure statements) or otherwise agreed between the parties.

**bond** means an amount paid or payable by a tenant as security for the performance of his or her obligations under a lease.

**certificate of occupancy** means a certificate under the *Building Act 1972*, section 53.

**certified exclusionary clause**—see section 111.

**change of use lease**—see section 9 (What is a *change of use lease*?).

**commencement day** means 1 July 2002.

**commercial premises**—see section 7 (When are premises commercial or retail premises?).

**conduct**, in relation to a lease or to negotiations for the entering into of a lease, means an act or omission in relation to the lease or negotiations.

### Examples of acts and omissions in relation to leases or negotiations

- 1 Making a request or demand of a person in relation to the lease or negotiations.
- 2 Taking action to enforce the terms of the lease.
- 3 An action or omission that causes a breach of the lease.

**core trading hours**, for a shopping centre, means the hours when retail premises in the shopping centre are generally required to be open for business, whether the requirement is imposed by or under the lease or by or under another agreement or arrangement between the lessor and tenant or is imposed in another way.

**demolition**, in relation to premises, includes any repair, renovation or reconstruction of a building containing the premises that cannot be carried out practicably without vacant possession of the premises.

**disclosure statement** means a disclosure statement under section 30 (Disclosure statements).

**discretionary rent review clause** means a provision in a lease that—

- (a) provides for rent to be set or changed in accordance with whichever of 2 or more methods of calculating the change would result in the highest rent; or
- (b) has the effect of reserving to a party to the lease a discretion as to which of 2 or more methods of calculating initial rent or a change to rent is to apply; or
- (c) has the effect of reserving to a party to the lease complete discretion as to the rate of rent to apply; or
- (d) has the effect of preventing, or giving a person the power to prevent, a decrease if the provision for determining initial rent or rent variations otherwise operates in a way that rent might decrease.

**dispute** means a dispute to which this Act applies under section 17 (Disputes).

**enter into**, a lease—see section 5 (When is a lease *entered into* to work out timing for obligations under this Act?).

**excluded area**—see section 11 (What is an *excluded area*?).

**extend**, under an option, includes renew under the option.

**GST**—see the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth), dictionary.

**initial rent** means the rent set at the beginning of a lease or renewal of a lease.

**key money** means 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—

- (a) rent; or
- (b) a payment for the goodwill or other assets of a business genuinely operated by the lessor that is sold or to be sold by the lessor to the tenant; or
- (c) a bond or security deposit, or a guarantee by way of security; or
- (d) an amount payable on account of outgoings; or
- (e) 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
- (f) any reasonable amount payable to a lessor for goods and services provided, or to be provided, to the tenant; or
- (g) an amount allowed to be paid under this Act.

**lease** means a lease, within the meaning of section 12 (What leases does this Act apply to?), to which this Act applies under that section.

*Note* Pt 13 only applies to leases for premises in retail areas of shopping centres.

**lessor**, of premises, means a person who grants a right to occupy the premises under a lease, and includes—

- (a) a sublessor; and
- (b) a person who receives the right to lease the premises by assignment from the lessor or by operation of law; and
- (c) in relation to negotiations for a lease—a prospective lessor.

**lettable area**, of premises, means the area of the premises worked out in accordance with section 13 (How to work out the lettable area of premises).

**Magistrates Court** means the Magistrates Court when exercising jurisdiction under this Act.

**market rent**, of premises—see schedule 1 (Working out market rent).

**normal purpose**, of leased premises that have been damaged, means the way the premises were ordinarily used by the tenant before they were damaged if the use was allowed under the lease.

**option**, for a lease, means a right given under the lease for—

- (a) the extension of the term of the lease; or
- (b) the renewal of the lease for a further term.

**premises**, for a lease, are the premises covered by the lease.

**recoverable outgoings** means outgoings recoverable under section 70 (Recoverable outgoings).

**renewal**, of a lease—see section 6 (When is a lease taken to be renewed for this Act?).

**rent** includes a component of rent.

**rent review** includes a change to rent payable on the exercise of an option under a lease, but does not include a predetermined rent change.

**retail area** means the area of a shopping centre other than an excluded area.

**shopping centre**—see section 8 (What are *shopping centres*?).

**small commercial premises** means commercial premises with a lettable area of no more than 300m<sup>2</sup>.

**taxable supply**—see the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth), dictionary.

**tenant**, of premises, means a person who has the right to occupy the premises under a lease, and includes—

- (a) a subtenant; and
- (b) a person who receives the right to occupy the premises by assignment from the tenant or by operation of law; and
- (c) in relation to negotiations for a lease—a prospective tenant.

**termination notice** means a notice under section 117 (Right to terminate—no disclosure statement etc) or 118 (Failure to notify material change in disclosure statement).

**Territory lease** means—

- (a) a lease granted under the *Land (Planning and Environment) Act 1991*; or
- (b) a lease under the *Unit Titles Act 2001*;

but does not include a sublease.

**turnover** includes gross takings, gross receipts and gross income.

**turnover rent** means rent, or the part of rent, based on the tenant's turnover.

**valuer** means a person who is competent in retail and commercial market rental valuations.

## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

If the republished law includes penalties, current information about penalty unit values appears on the republication inside front cover.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	p = page
cl = clause	par = paragraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	prov = provision
exp = expires/expired	pt = part
Gaz = Gazette	r = rule/subrule
hdg = heading	reg = regulation/subregulation
ins = inserted/added	renum = renumbered
LA = Legislation Act 2001	reloc = relocated
LR = legislation register	R[X] = Republication No
LRA = Legislation (Republication) Act 1996	s = section/subsection
mod = modified / modification	sch = schedule
No = number	sdiv = subdivision
num = numbered	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

## Endnotes

3 Legislation history

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### 3 Legislation history

#### **Leases (Commercial and Retail) Act 2001 No 18**

notified 19 April 2001 (Gaz 2001 No 16)

s 1, s 2 commenced 19 April 2001 (IA s 10B)

remainder commenced 1 July 2002 (s 2)

### 4 Amendment history

#### **Commencement**

s 2 om LA s 89 (4)

#### **Transitional**

pt 16 hdg [exp 1 July 2004 \(s 171\)](#)

#### **Transitional**

div 16.1 hdg om R1 LA

#### **Definitions for div 16.1**

s 159 [exp 1 July 2004 \(s 171\)](#)

#### **Pre-existing referrals**

s 160 [exp 1 July 2004 \(s 171\)](#)

#### **Provisions required to be included—application to pre-existing leases**

s 161 [exp 1 July 2004 \(s 171\)](#)

#### **Lessor's intentions about renewal**

s 162 [exp 1 July 2004 \(s 171\)](#)

#### **Preference to existing tenants**

s 163 [exp 1 July 2004 \(s 171\)](#)

#### **Provisions taken to be included—application to pre-existing leases**

s 164 [exp 1 July 2004 \(s 171\)](#)

#### **Application of Act to disputes under code**

s 165 [exp 1 July 2004 \(s 171\)](#)

#### **Approved handbook and pre-existing leases**

s 166 [exp 1 July 2004 \(s 171\)](#)

#### **Tribunal decisions**

s 167 [exp 1 July 2004 \(s 171\)](#)

#### **Application of Act to leases code applied to**

s 168 [exp 1 July 2004 \(s 171\)](#)

#### **Transitional regulations**

s 169 [exp 1 July 2004 \(s 171\)](#)

**Modification of pt 16's operation**s 170 [exp 1 July 2004 \(s 171\)](#)**Expiry of pt 16**

s 171 hdg am R1 LA

s 171 am R1 LA  
[exp 1 July 2004 \(s 171\)](#)**Consequential repeals and amendments**

div 16.2 hdg exp 1 July 2002 (s 176)

**Repeal**

s 172 exp 1 July 2002 (s 176)

**Amendment of Land Titles Act**

s 173 exp 1 July 2002 (s 176)

**Amendment of Magistrates Court Act**

s 174 exp 1 July 2002 (s 176)

**Amendment of Magistrates Court (Civil Jurisdiction) Act**

s 175 exp 1 July 2002 (s 176)

**Expiry of div 16.2**

s 176 exp 1 July 2002 (s 176)

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