

TASMANIA

RETAIL LEASES BILL 2022

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RETAIL LEASES BILL 2022

(Brought in by the Minister for Workplace Safety and Consumer Affairs, the Honourable Elise Nicole Archer)

A BILL FOR

An Act to make provision in relation to leases of certain retail premises and other business premises, and the rights and obligations of landlords and tenants of those retail premises and other business premises, to rescind the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*, and for other related purposes

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Retail Leases Act 2022*.

2. Commencement

The provisions of this Act commence on a day or days to be proclaimed.

3. Objects of Act

The objects of this Act are to facilitate –

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- (a) the certainty and fairness of retail premises leasing arrangements between landlords and tenants; and
- (b) the mechanisms available to resolve disputes concerning retail leases; and
- (c) the certainty and fairness of certain other aspects of retail leases.

4. Act binds Crown

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

5. Effects of Act on common law

- (1) The common law in relation to retail leases remains in force to the extent to which it is not inconsistent with this Act.
- (2) A person is entitled to exercise any rights that the person may have at common law in relation to retail leases, except to the extent to which this Act provides otherwise.

6. Interpretation

In this Act, unless the contrary intention appears –

accounting year means –

- (a) an accounting year as set out in a lease for premises; or

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- (b) if an accounting year is not so set out, a financial year;

assignment includes a sublease of the whole or a part of the retail premises referred to in a retail lease;

auditor means –

- (a) a person who is –
 - (i) a registered company within the meaning of the Corporations Act; and
 - (ii) a member of the Chartered Accountants Australia and New Zealand or the Australian Society of Certified Practising Accountants; or
- (b) a person who is specified, in a determination made for the purposes of this definition, as an auditor for the purposes of this Act;

authorised person means –

- (a) the Director; and
- (b) a person who is specified, in a determination made for the purposes of this definition, as an authorised person for the purposes of this Act; and

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- (c) an authorized officer within the meaning of the *Consumer Affairs Act 1988*;

base rent – see section 47;

code of practice means a code of practice for retail leases determined in accordance with section 18;

current market rent – see section 42;

determination, in relation to a matter, means a determination of the Director made under section 16 in respect of the matter;

Director means the Director of Consumer Affairs and Fair Trading appointed under the *Consumer Affairs Act 1988*;

function includes a power, an authority and a duty;

key-money means money to be paid or a benefit to be given –

- (a) by way of a premium, or something similar in nature to a premium, where there is no real consideration given for the payment or benefit; and
- (b) in consideration of a benefit in connection with the granting, renewal, extension or assignment of a retail lease;

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landlord, in relation to a retail lease, means the person who grants or proposes to grant the right to occupy retail premises under the retail lease, and includes –

- (a) a sublandlord; and
- (b) a landlord's or sublandlord's heirs, executors, administrators and assigns; and
- (c) a prospective landlord or a former landlord;

landlord's disclosure statement – see section 23;

lettable area, in relation to retail premises, means the area of the retail premises designed and available for use wholly or predominantly for the carrying on of a business under a retail lease;

mediator means a person appointed as a mediator in accordance with section 71;

option means an option contained in a retail lease for a further lease on substantially the same terms and conditions as the lease;

party, in relation to a retail lease, means the landlord, or the tenant, under the lease;

regulations means regulations made under this Act;

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renewal, in relation to a retail lease – see section 57;

retail lease or *lease* means an agreement under which a person grants or agrees to grant to another person, for valuable consideration, a right of occupation of premises for the use of the premises as retail premises –

- (a) whether or not the right of occupation is an exclusive right to occupy the retail premises; and
- (b) whether the agreement is express or implied;

retail leases guide means a retail leases guide determined in accordance with section 21;

retail premises means –

- (a) business premises –
 - (i) at which goods are sold to the public by retail; or
 - (ii) at which services are provided to the public; or
 - (iii) to which the public is invited to negotiate for the supply of services; or
- (b) business premises that are prescribed as retail premises for the purposes of this definition –

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but does not include business premises that are prescribed as not being retail premises for the purposes of this definition;

retail shopping centre means a cluster of 5 or more business premises that has all of the following attributes:

- (a) at least 5 of the business premises are retail premises;
- (b) the business premises are all owned by the same person or have (or would have if leased) the same landlord;
- (c) the business premises are located –
 - (i) in a single building; or
 - (ii) in 2 or more buildings that are –
 - (A) adjoining; or
 - (B) separated only by common areas or other areas owned by the owner of the business premises; or
 - (C) separated only by a road or walkway;

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- (d) the cluster of business premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court, shopping plaza or shopping arcade;

sinking fund means a fund into which a tenant is required to make regular payments to cover the costs associated with the maintenance of, or repairs to, any area, building, plant or equipment associated with the retail premises;

specialist retail valuer means –

- (a) for the purposes of a valuation relating to retail premises in a retail shopping centre, a valuer having not less than 5 years' experience in valuing retail premises located in regional or sub-regional shopping centres; or
- (b) for the purposes of a valuation relating to any other retail premises, a valuer having not less than 5 years' experience in valuing retail premises;

special rent – see section 46;

tenant means the person who has the right to occupy retail premises under a retail lease, and includes –

- (a) a sublessee; and

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- (b) a prospective lessee or a former lessee;

turnover rent – see section 45;

valuer means –

- (a) a person who –
 - (i) is a member of the Australian Institute of Valuers and Land Economists; and
 - (ii) has expertise in determining the market value of rentals of the kind referred to in section 42 or 43; and
 - (iii) has at least 5 years' experience in retail premises valuations in Tasmania; or
- (b) a person who is specified, in a determination made for the purposes of this definition, as a valuer for the purposes of this Act.

7. When retail leases entered into

For the purposes of this Act, a retail lease is taken to have been entered into on the earliest of the following dates:

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- (a) the first date on which the lease is signed by all of the parties to the lease;
- (b) the date on which the tenant enters into possession of the retail premises as a tenant under the lease;
- (c) the date on which the tenant first pays rent as a tenant under the lease, other than a deposit to secure the retail premises for the lease.

PART 2 – APPLICATION OF ACT

8. Leases to which this Act does not apply

- (1) Subject to section 9, this Act does not apply to –
- (a) a lease of retail premises with a lettable area of more than 1 000 square metres; or
 - (b) a lease of premises if the premises are not retail premises at the time at which the retail lease is entered into or is renewed; or
 - (c) a retail lease for a term of less than 6 months, where there is no right for the tenant to extend the lease (whether by means of an option to extend or renew the lease or otherwise); or
 - (d) a retail lease entered into, or renewed, before the commencement of this section.
- (2) The *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*, as in force immediately before this section commences –
- (a) apply to retail leases referred to in subsection (1)(a) or (d); and
 - (b) are taken to remain in force in respect of a lease referred to in paragraph (a) if those regulations are rescinded while this section applies to such a lease.

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Part 2 – Application of Act

9. Leases to which Act applies

- (1) This Act applies to a retail lease that is –
 - (a) entered into after the commencement of this section; or
 - (b) renewed after the commencement of this section, whether the lease was entered into before or after the commencement of this section; or
 - (c) under negotiation and the lease agreement process is started before the commencement of this section; or
 - (d) a lease in a prescribed class of leases.
- (2) Despite section 8(1)(c), this Act applies to a retail lease, on and from the day on which the tenant has continuously been in possession of the retail premises for 6 months, if –
 - (a) the term of a retail lease is less than 6 months; and
 - (b) the tenant is continuously in possession of the retail premises for 6 months or more under the lease because of the retail lease being renewed one or more times or being continued (or both).
- (3) Despite section 8(1)(d), this Act applies to retail premises if the premises are occupied –
 - (a) before the commencement of this section; and

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- (b) in anticipation of the signing of a retail lease after the commencement of this section.
- (4) Despite section 8, this Act applies to all retail leases on the 5th anniversary of the commencement of this section.

10. Act applies to all retail premises in Tasmania

Subject to this Part, this Act applies to a lease that provides for the occupation of retail premises that are located in Tasmania regardless of –

- (a) where the retail lease is entered into; and
- (b) whether the retail lease purports to be governed by a law other than a law of Tasmania.

11. Acts provisions implied in retail leases

If, under this Act, a duty is imposed, or an entitlement is conferred, on a landlord or on a tenant under a retail lease, the duty or the entitlement is taken to be included in the retail lease.

12. Contracting out of Act prohibited

A provision of a retail lease is void to the extent that it purports to –

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- (a) exclude the application of a provision of this Act that applies to the retail lease; or
- (b) modify, or limit, the application of a provision of this Act that applies to the retail lease.

13. Act prevails over inconsistent retail leases

- (1) This Act operates despite the provisions of a retail lease.
- (2) If a provision of this Act is inconsistent with a provision of a retail lease, the provision of this Act prevails and the provision of the lease is void to the extent of the inconsistency.

PART 3 – ADMINISTRATION OF ACT

14. Administration

The Director is responsible for the administration of this Act.

15. Functions and powers of Director

- (1) In addition to his or her functions under any other Act, the Director has the following functions:
- (a) to investigate and research matters relevant to retail leases;
 - (b) to prepare and publish any information or materials relevant to retail leases;
 - (c) to provide information to the public, to tenants and to landlords about retail leases and the provisions of this Act;
 - (d) to investigate suspected infringements of this Act and to take appropriate actions to ensure the enforcement of this Act;
 - (e) to ensure that the provisions of this Act are complied with;
 - (f) to report to the Minister in relation to –
 - (i) the operation of this Act; and
 - (ii) any matters, referred to the Director by the Minister, in

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relation to the administration of
this Act; and

(iii) the Director's functions;

- (g) to establish any groups or committees that the Director requires for the purposes of this Act;
- (h) to appoint any persons for the purposes of this Act;
- (i) to produce model retail leases for viewing or sale;
- (j) to participate in any national committees reviewing the operation of laws relating to retail leases;
- (k) to make arrangements, and to provide administrative assistance, to facilitate the resolution by mediation of a dispute between the parties to a retail lease under this Act;
- (l) any other functions conferred or imposed on the Director by or under this or any other Act.

(2) The Director has –

- (a) the power to do anything necessary or convenient to be done for or in connection with, or incidental to, the exercise, or the performance, of any power or function conferred or imposed

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on the Director by this or any other Act;
and

- (b) such other powers as are expressly or impliedly given to the Director by this or any other Act.
- (3) For the purposes of this Act and without limiting the powers of the Director under subsection (2), for a purpose in connection with the administration or enforcement of this Act, the Director has the power to –
 - (a) require a person to produce a retail lease for inspection; and
 - (b) retain a retail lease for inspection, or make a copy of it or take extracts from it; and
 - (c) at any reasonable time, enter and inspect retail premises; and
 - (d) give a person a warning or a caution, if the Director reasonably believes that the person has contravened a provision of this Act and the Director is of the opinion that the matter does not warrant any formal action under this Act.

16. Determinations by Director

- (1) The Director may, in writing –
 - (a) determine a matter that is specified in this Act as a matter in respect of which a determination may be made; and

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- (b) amend or revoke a determination made under paragraph (a).
- (2) The Director, before making a determination under subsection (1), is to consult with any person who the Director considers may have an interest in the content of the determination.
- (3) The Director must ensure that copies of a determination made under subsection (1)(a) or amended under subsection (1)(b), that has not been revoked under subsection (1)(b), are –
 - (a) made available for viewing by the public on a website of the Department in accordance with subsection (5); and
 - (b) made available, during ordinary business hours, for viewing or purchase by a member of the public at offices of the Director; and
 - (c) if the Director thinks fit, made available, during ordinary business hours, for viewing by a member of the public in another manner, if any, as determined by the Director.
- (4) The Director must ensure that notice of the revocation of a determination under subsection (1)(b) is –
 - (a) placed on a website of the Department for at least 12 months after the day on which the revocation takes effect; and

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- (b) if the Director thinks fit, given to members of the public in the manner that is determined by the Director.
- (5) A determination of a matter by the Director under this section is of no effect at a relevant time if a copy of the determination is not made available, at that time, for viewing by the public on a website of the Department.

17. Determinations of time periods

Despite the provisions of this Act, the Director may make a determination that specifies the time period by which an action must be taken by a person for the purposes of complying with a provision of this Act that is specified in the determination.

18. Determinations of codes of practice

The Director is to make a determination that a specified document, or other instrument, is a code of practice for retail leases for the purposes of this Act.

19. Determinations of terms and conditions of retail leases

- (1) The Director may make a determination that specifies the terms and conditions that apply to a retail lease for the purposes of this Act.
- (2) The provisions of section 47(3), (3A), (4), (5), (6) and (7) of the *Acts Interpretation Act 1931*

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apply to a determination made for a purpose specified in this section as if a reference in that section to a regulation were a reference to such a determination.

20. Delegations by Director

The Director may, in writing, delegate any of his or her powers and functions under this Act, other than this power of delegation or the power to make a determination, to –

- (a) a specific person; or
- (b) a person from time to time holding, acting in or performing the duties of a specified office, designation or position.

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PART 4 – ENTERING INTO RETAIL LEASES

Division 1 – Rights and duties before retail leases entered into

21. Copy of retail leases guide to be provided at negotiation stage

- (1) The Director is to make a determination that a specified document, or other instrument, is a retail leases guide for the purposes of this Act.
- (2) A person must not, as a landlord or on behalf of a landlord, offer to enter into a retail lease, invite an offer to enter into a retail lease or indicate by writing or broadcast advertisement that retail premises are for lease, unless the person makes a copy of the retail leases guide available to a prospective tenant as soon as the person enters into negotiations concerning the lease with the prospective tenant.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 300 penalty units; and
- (b) an individual, a fine not exceeding 100 penalty units.

22. Tenants to be given copy of retail leases

A person must not, as a landlord or on behalf of a landlord, offer to enter into a retail lease, invite an offer to enter into a retail lease or indicate by

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writing or broadcast advertisement that retail premises are for lease, unless the person –

- (a) has a copy of a proposed retail lease (in written form, but not necessarily including the particulars of the tenant, the rent payable by the tenant or the term of the lease) available for inspection by a prospective tenant; and
- (b) makes a copy of a proposed retail lease available to any prospective tenant as soon as the person enters into negotiations with the prospective tenant concerning the lease.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 300 penalty units; and
- (b) an individual, a fine not exceeding 100 penalty units.

23. Landlord's disclosure statements

- (1) Subject to subsections (2) and (3), the Director is to make a determination that specifies the form and the content of a landlord's disclosure statement.
- (2) A landlord's disclosure statement must –
 - (a) specify –

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-
- (i) the rent that is payable by the tenant under the retail lease and the method used to calculate that rent; and
 - (ii) when a review of the rent that is payable by the tenant under the retail lease is to take place and the basis on which the review is to be made; and
 - (iii) all other actual costs and charges, or estimated costs and charges, that are payable by the tenant under the retail lease, including, in the case of estimated costs and charges, the method of calculating the estimated costs and charges; and
- (b) in the case of a landlord's disclosure statement for the assignment of a retail lease, specify sufficient information to enable the tenant to make a commercial decision regarding the assignment of the retail lease; and
- (c) have attached to it –
- (i) a copy of the retail leases guide; and
 - (ii) a copy of the proposed retail lease; and
 - (iii) a copy of the code of practice; and

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- (d) contain a statement notifying the tenant that he or she should seek independent legal advice; and
 - (e) contain, or have attached to it, any information, or material, that is relevant to the retail lease that the Director specifies in a determination made under subsection (1).
- (3) A landlord's disclosure statement may be amended with the agreement in writing of both the landlord and the tenant before or after the retail lease is entered into and any such amendment has effect from the date specified in the agreement (which can be a date before the agreement is made).
- (4) If the retail premises are situated in a retail shopping centre, in addition the requirements of subsections (1), (2) and (3), the landlord's disclosure statement must also specify –
 - (a) the annual sales of the retail shopping centre; and
 - (b) the annual turnover per square metre of at least 3 different categories of retail premises, including but not limited to retail premises selling food, selling other goods or providing a service, in the retail shopping centre; and
 - (c) a recent traffic count at the retail shopping centre; and

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- (d) details of specific fit-out construction standards that apply in relation to the retail shopping centre; and
- (e) the current tenant mix and when the leases of major tenants in the retail shopping centre expire; and
- (f) the permitted uses of the prospective retail premises in the retail shopping centre; and
- (g) the core trading hours and whether any changes to the retail shopping centre core trading hours are proposed; and
- (h) details of all the expenditure incurred or to be incurred by the landlord during the term of the lease on account of advertising, promotion and marketing costs to which the tenant is required to contribute under the retail lease.

24. Tenants to be given copy of landlord's disclosure statements

- (1) A landlord must ensure that a tenant is given a copy of the landlord's disclosure statement for a retail lease –
 - (a) at least 7 days before the retail lease is entered into by the tenant; and
 - (b) at least 30 days before the retail lease is renewed by the tenant; and

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- (c) at such other interval as is specified in a determination made for the purposes of this subsection.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 300 penalty units; and
 - (b) an individual, a fine not exceeding 100 penalty units.
- (2) The tenant is to sign an acknowledgement of receipt of a copy of the landlord's disclosure statement before signing the retail lease or a document that binds the tenant to enter into the lease or to take the retail premises on lease for a renewed term.

25. Landlord's disclosure statements and renewals of retail leases

If a retail lease is entered into by way of a renewal of the lease, a written statement (a ***landlord's disclosure update***) that updates the provisions of an earlier landlord's disclosure statement given to the tenant is, in conjunction with that earlier landlord's disclosure statement agreement, taken to be a landlord's disclosure statement given at the time the landlord's disclosure update is given.

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26. Failure of landlords to give landlord's disclosure statements to tenants

- (1) A tenant may terminate a retail lease by notice in writing to the landlord at any time within 6 months after the lease was entered into if –
 - (a) the tenant has not been given a landlord's disclosure statement; or
 - (b) the landlord's disclosure statement given to the tenant is incomplete or contains information that at the time at which it was given was materially false or misleading.
- (2) If the tenant under a retail lease gives the landlord a notice of termination under subsection (1), the retail lease terminates upon the expiry of the 14-day period after the notice was given.
- (3) If a tenant terminates a retail lease in accordance with this section, the tenant is entitled to recover compensation from the landlord for costs reasonably incurred by the tenant in connection with the tenant entering into the lease, including fit-out of the retail premises.
- (4) The termination of a retail lease under this section does not affect any right, privilege, obligation or liability acquired, accrued or incurred by either party under the retail lease in respect of any period before its termination.

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Part 4 – Entering into Retail Leases

27. Right to compensation for pre-lease misrepresentations

- (1) A party to a retail lease is liable to pay another party to the lease (the *injured party*) reasonable compensation for damage suffered by the injured party that is attributable to the injured party entering into the lease as a result of –
 - (a) a false or misleading statement of the other party; or
 - (b) a false or misleading representation of the other party.
- (2) The giving of a landlord's disclosure statement to a prospective tenant under a retail lease is taken to be the making of a representation by the landlord to the tenant as to the information contained in the disclosure statement.
- (3) A disclosure statement given by the tenant to a prospective landlord under a retail lease –
 - (a) that the prospective tenant has sought independent legal advice; or
 - (b) as to the statements or representations relied on by the prospective tenant in entering the lease –

is taken to be the making of a representation by the tenant to the landlord.

28. Retail lease costs

- (1) Subject to this Act –

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- (a) a tenant is not liable to pay an amount to the landlord for legal or other expenses incurred by the landlord in connection with the preparation of a retail lease; and
 - (b) each party to a proposed retail lease is liable for his or her own costs incurred in the preparation of the lease.
- (2) Despite subsection (1), a landlord may charge the tenant the cost of any alterations that the tenant has requested to be made to the retail lease.

Division 2 – Security deposits

29. Security deposits

- (1) A retail lease is to specify the amount that is to be paid by a tenant to the landlord as a security deposit for the performance of the tenant's obligations under the lease.
- (2) The amount of a security deposit that is specified in a retail lease in accordance with subsection (1), must not be an amount that is more than 3 months' rent payable by the tenant under the retail lease.
- (3) A security deposit must be held in trust by the landlord on behalf of the tenant in an interest-bearing account.
- (4) A landlord must not –
 - (a) require more than one security deposit for the same retail lease; and

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- (b) unreasonably refuse to accept a guarantee from an authorised deposit-taking institution in satisfaction of any requirement to provide a security deposit for the performance of the tenant's obligations under a retail lease.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 100 penalty units; and
 - (b) an individual, a fine not exceeding 50 penalty units.
- (5) A landlord that has received a security deposit from a tenant –
- (a) must account to the tenant for the interest earned on the security deposit; and
 - (b) is entitled to keep the interest earned on the security deposit and deal with the interest as money paid by the tenant to the landlord that does not form part of the security deposit; and
 - (c) must advise the tenant in writing of –
 - (i) the terms and conditions on which the security deposit is held; and
 - (ii) the grounds on which the landlord may refuse to refund all

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or part of the security deposit;
and

- (d) is not entitled to keep a guarantee from an authorised deposit-taking institution, provided to the landlord in satisfaction of any requirement to provide a security deposit for the performance of the tenant's obligations under the retail lease, for more than 2 months after a tenant completes the performance of his or her obligations under the retail lease for which the guarantee was provided as security.

- (6) This section does not affect any lawful entitlement of a landlord to appropriate security deposit payments.

30. Release of security deposits

- (1) If a landlord and tenant agree, in writing, all or part of the amount of a security deposit paid by the tenant may be paid out to the parties in accordance with the terms of that written agreement.
- (2) Either party to a retail lease may, in writing, seek the agreement of the other party to the lease for all, or part, of the amount of a security deposit to be paid in accordance with subsection (1).
- (3) A landlord must release the amount of a security deposit to the tenant within –

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- (a) if an agreement is made under this section for the release of the amount, 30 days of the date of that agreement; or
 - (b) if the release of the amount is the result of a dispute determined under Part 11, 30 days of the date of the resolution of the dispute.
- (4) In this section, a reference to a security deposit includes a reference to the drawdown by a landlord of a guarantee from an authorised deposit-taking institution that was accepted by the landlord in satisfaction of the requirement of the tenant to pay a security deposit.

Division 3 – Entering into retail leases

31. Retail leases to be in writing and signed

- (1) A landlord, or a tenant, must not enter into a retail lease that is not –
- (a) in writing; and
 - (b) signed by both parties to the retail lease.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 300 penalty units; and
- (b) an individual, a fine not exceeding 100 penalty units.

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(2) A landlord, or a tenant, must not amend a retail lease unless the amendment is –

- (a) in writing; and
- (b) signed by both parties to the retail lease.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 100 penalty units; and
 - (b) an individual, a fine not exceeding 50 penalty units.
- (3) Nothing in this section means that a retail lease that fails to comply with this section is illegal, invalid or unenforceable.

32. Tenants to be given copy of retail leases

A landlord must provide a tenant with an executed copy of a retail lease within 30 days after the retail lease is returned to the landlord following its execution by the tenant.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 100 penalty units; and
- (b) an individual, a fine not exceeding 50 penalty units.

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33. Tenants not required to pay undisclosed contributions

A provision of a retail lease is void to the extent that it requires a tenant to pay or contribute towards the cost of any finishes, fixtures, fittings, equipment or services, except where the liability to make the payment or contribution is disclosed in a landlord's disclosure statement.

34. Key-money prohibited

- (1) A person must not, as a landlord or on behalf of a landlord, seek or accept key-money in connection with the granting of a retail lease.

Penalty: Fine not exceeding 100 penalty units.

- (2) A provision of a retail lease is void to the extent that it requires or has the effect of requiring key-money in connection with the granting of the retail lease.

- (3) If a person contravenes this section, whether or not the person is found guilty of an offence against subsection (1), the tenant is entitled to recover from the landlord as a debt –

- (a) a payment made by the tenant; or
- (b) the value of any benefit conferred by the tenant –

that was accepted by or on behalf of the landlord in contravention of this section.

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Division 4 – Outgoings

35. Recovery of outgoings from tenants

- (1) A tenant under a retail lease is not liable to pay any amount to a landlord in respect of outgoings unless –
- (a) details of the nature of the outgoings that are to be regarded as recoverable are specified by the landlord in the retail lease together with –
 - (i) an estimate of the amount of the outgoings; and
 - (ii) the basis on which, or the formulae with respect to which, the estimated amount of the outgoings were calculated; and
 - (iii) details as to how those outgoings, or any part of it, may be recovered by the landlord from the tenant; and
 - (b) the liability of the tenant to pay the outgoings, and an estimate of the amount of the outgoings, was disclosed in the landlord's disclosure statement, together with –
 - (i) the basis on which, or the formulae with respect to which, that estimated disclosed amount was calculated; and

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- (ii) how those outgoings, or any part of it, may be recovered by the landlord from the tenant.
- (2) If a landlord, and a tenant, under a retail lease are both liable to pay an amount in respect of an outgoing –
 - (a) details of the nature of the outgoing are to be specified in the retail lease together with –
 - (i) an estimate of the proportion of the amount of the outgoing that is to be paid by the tenant; and
 - (ii) an estimate of the proportion of the amount of the outgoing that is to be paid by the landlord; and
 - (iii) the basis on which, or the formulae with respect to which, the apportioning of the estimated amount of the outgoing between the tenant and the landlord was calculated; and
 - (iv) how that outgoing, or any part of it, may be recovered by the landlord from the tenant; and
 - (b) the liability of the tenant to pay the estimated proportion of the amount of the outgoing, and the liability of the landlord to pay the estimated proportion of the outgoing, was disclosed in the landlord's disclosure statement, together with –

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- (i) the basis on which, or the formulae with respect to which, the apportioning of the estimated amount of the outgoing between the tenant and the landlord was calculated; and
 - (ii) how that outgoing, or any part of it, may be recovered by the landlord from the tenant.
 - (3) If a landlord's disclosure statement included an estimate of the amount of an outgoing (the *estimated outgoing amount*) that is less than the actual outgoing amount –
 - (a) if there was no reasonable basis for the estimated outgoing amount when the landlord's disclosure statement was given, the tenant's liability for any payment in respect of the outgoing is to –
 - (i) be determined on the basis of the estimated outgoing amount rather than the actual amount; and
 - (ii) be reduced accordingly; and
 - (b) if the tenant's liability to pay an amount of an outgoing is reduced under paragraph (a), any liability of the tenant to pay a subsequent increase in the amount of the outgoing is to be reduced by the same proportion as the actual outgoing amount was reduced under that paragraph.

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- (4) This section does not apply to an outgoing in the nature of a tax, rate or levy that is imposed by or under an Act after the landlord's disclosure statement is given and that was not an outgoing of the landlord when the landlord's disclosure statement was given.
- (5) A tenant is entitled to recover from a landlord any amount paid to the landlord that the tenant was not liable to pay because of this section.
- (6) A tenant is not liable for the following outgoings:
 - (a) any capital expenditure on the building that is the retail premises or the building in which the retail premises is located;
 - (b) any amount in respect of depreciation;
 - (c) any contribution to a sinking fund to provide for capital works;
 - (d) any contribution by a landlord to promotion and advertising;
 - (e) any amount in respect of interest or other charges incurred by the landlord in respect of amounts borrowed by the landlord;
 - (f) any insurance premium, or excess payable in respect of an insurance premium, for loss of income by the landlord;

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- (g) any amount in respect of rent or other costs payable by the landlord in respect of –
 - (i) premises other than the premises specified in the retail lease; and
 - (ii) land on which the building, of which the retail premises forms a part, is located;
 - (h) any outgoings that were not specified in the lease that were reasonably foreseeable at the time when the lease was entered into.

36. Statements of outgoings

- (1) A landlord must prepare a written statement of outgoings that details all expenditure by the landlord, in each of the accounting years for the duration of lease, in respect of the outgoings for the retail premises to which the tenant is liable to contribute –
 - (a) for the period from 1 July until 30 September (both days inclusive) in the accounting year; and
 - (b) for the period from 1 October until 31 December (both days inclusive) in the accounting year; and
 - (c) for the period from 1 January until 31 March (both days inclusive) in the accounting year; and

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- (d) for the period from 1 April until 30 June (both days inclusive) in the accounting year –

at least 10 working days before the first day of the period in the accounting year that is specified in the written statement of outgoings.

- (2) Within 5 days after preparing a written statement of outgoings under subsection (1), the landlord is to provide the tenant with a copy of the written statement.
- (3) Within 30 days after receiving a written statement of outgoings under subsection (2), the tenant is to pay the total amount of the outgoings specified in the written statement.
- (4) A landlord is to keep a copy of all written statements of outgoings provided to a tenant in accordance with subsection (2) for the duration of the retail lease to which the written statements relate.
- (5) A tenant can withhold payment for any outgoings payable by the tenant under a retail lease if the landlord has not provided the tenant with a written statement of outgoings in accordance with subsection (2).

37. Audit of outgoings reports

- (1) A tenant may request, in writing, a landlord to appoint an auditor for the purposes of providing a report, for an accounting period specified in the request, to the tenant which audits the

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outgoings specified in a written statement of outgoings provided to the tenant in accordance with section 36(2).

- (2) Within 30 days after the day on which a landlord receives a written request under subsection (1), the landlord must appoint an auditor for the purposes of preparing the report.

Penalty: Fine not exceeding 50 penalty units.

- (3) A landlord must provide an auditor, appointed by the landlord under subsection (2), with any information or documentation that the auditor requires to prepare the relevant report.

Penalty: Fine not exceeding 50 penalty units.

- (4) An auditor is to –

(a) prepare a written report –

- (i) in accordance with the relevant principles and disclosure requirements of the applicable accounting standards (as in force from time to time) made by the Australian Accounting Standards Board of the Commonwealth; and
- (ii) that states whether or not the outgoings specified in a written statement of outgoings for the relevant accounting period have been expended, and charged, in accordance with the written

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statement of outgoings and the
relevant retail lease; and

- (b) when the auditor has finalised the report, provide the landlord and the tenant with a copy of that finalised report.
- (5) The cost of a report prepared and finalised by an auditor in accordance with this section is to be paid by –
 - (a) the tenant who requested the report under subsection (1), if the report states that the outgoings specified in the written statement of outgoings are more than 95% accurate; or
 - (b) the landlord who appointed the auditor under subsection (2), if the report states that the outgoings specified in the written statement of outgoings are 95% or less than 95% accurate.

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38. When rent is payable

A tenant is not liable to pay rent, or another amount payable by the tenant (such as an amount payable in respect of outgoings), under a retail lease in respect of any period –

- (a) before the tenant has entered into possession of the retail premises (whether or not the tenant is required to enter into possession by a specified date); and
- (b) before the landlord has substantially complied with the landlord's fit-out obligations set out in the retail lease.

39. GST payments

The rent and outgoings specified in a retail lease are taken to be inclusive of GST, within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

40. Basis or formula used to calculate rent

- (1) A retail lease must specify the basis or formula that is used to calculate the rent payable by the tenant under the retail lease.
- (2) For the purposes of subsection (1), any one of the following bases or formulae may be used to

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calculate the rent payable by a tenant under a retail lease:

- (a) current market rent;
- (b) base rent;
- (c) turnover rent;
- (d) special rent.

41. Timing and basis of rent reviews

- (1) If a retail lease provides for a review of the rent payable under the lease, or under an option to renew or extend the lease, the lease must state –
 - (a) when the review is to take place; and
 - (b) the basis on which, or formulae with respect to which, the review is to be made.
- (2) A retail lease must not provide for a review of the rent to be made more frequently than once in each 12-month period after the first anniversary of the commencement of the lease.
- (3) For the avoidance of doubt, subsection (2) does not apply to –
 - (a) the first year of a retail lease; or
 - (b) a change to the rent by a specified amount or a specified percentage that is set out in the retail lease.

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- (4) A retail lease may provide for a review of the rent to be made using different bases or formulae during the term of the retail lease, but each review must be made using only one basis or formula.
- (5) If a lease does not state the date on which a proposed review of the rent is due or the basis on which, or formulae in respect of which, the review of the rent is to be made, an adjustment to the rent is not to be made.
- (6) A provision of a retail lease is void to the extent that it –
- (a) prohibits a decrease in the rent; or
 - (b) reserves or has the effect of reserving to one party to the retail lease a discretion to decide which of two or more bases or formulae for calculating a change to the rent is to apply on a particular occasion; or
 - (c) provides a basis or formula for calculating a change to the rent but reserves or has the effect of reserving to one party a discretion to decide whether or not the rent is to be changed in accordance with that basis or formula on a particular occasion; or
 - (d) provides for the rent to change on a particular occasion in accordance with whichever of two or more bases or formulae for calculating the change would result in the higher or highest rent.

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- (7) A rent review is to be conducted as early as possible within the time period provided by the retail lease, and, if the landlord has not initiated the review within 90 days after the end of that period, the tenant may initiate the review.

42. Meaning of *current market rent*

- (1) A retail lease that provides for rent to be calculated or reviewed by the current market rent, or that provides an option to renew or extend the lease at current market rent, is taken to include provisions to the following effect:
- (a) the current market rent is the rent that would reasonably be expected to be paid for the retail premises, determined on an effective rent basis, having regard to the following matters:
 - (i) the provisions of the retail lease;
 - (ii) the rent that would reasonably be expected to be paid for the retail premises, in a free and open market between a willing landlord and a willing tenant in an arm's length transaction, if it were unoccupied and offered for rent for the same or substantially similar use to which the retail premises may be put under the lease;
 - (iii) the gross rent, less the landlord's outgoings payable by the tenant;

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- (iv) rent concessions and other benefits that are frequently or generally offered to prospective tenants of unoccupied retail premises;
 - (b) for paragraph (a), the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings on the retail premises.
 - (2) If a landlord and a tenant do not agree on what the amount of the current market rent is to be, it is to be determined by a valuation carried out by a specialist retail valuer appointed by –
 - (a) an agreement between the landlord and the tenant; or
 - (b) if there is no agreement, the Director.
 - (3) A landlord and a tenant are to pay the costs of a valuation by a specialist retail valuer in equal shares.
 - (4) A landlord must, within 14 days after a request is made to the landlord by the specialist retail valuer, supply the valuer with relevant information about retail leases for retail premises located in the same building or retail shopping centre to assist the valuer to determine the current market rent.

Penalty: Fine not exceeding 50 penalty units

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- (5) In determining the amount of current market rent, a specialist retail valuer must take into account the matters set out in subsection (1).
- (6) A valuation of current market rent carried out by a specialist retail valuer is to –
 - (a) be in writing; and
 - (b) contain detailed reasons for the specialist retail valuer's determination; and
 - (c) specify the matters to which the valuer had regard in making the determination.
- (7) A specialist retail valuer must carry out the valuation of current market rent not later than one month after accepting the appointment.

43. Review of valuations of market rent

- (1) If, within 21 days after the date on which a valuation of current market rent is carried out under section 42, the landlord or the tenant dispute that valuation, the landlord or the tenant may apply to the Director for a review of that current market rent valuation.
- (2) An application under subsection (1) is to –
 - (a) be in writing; and
 - (b) include a copy of the valuation of current market rent that is the subject of the review.

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- (3) On receipt of an application under subsection (1), the Director is to appoint 2 specialist retail valuers –
- (a) to carry out an independent valuation of the current market rent; and
 - (b) to agree on the amount of that valuation, taking into account the matters set out in section 42(1).
- (4) A landlord must, not later than 14 days after a request by a specialist retail valuer is made to the landlord, supply the valuer with all relevant information about retail leases for retail premises situated in the same building or retail shopping centre to enable the valuers to carry out the independent valuation of the current market rent of the retail premises that are the subject of the valuation.

Penalty: Fine not exceeding 50 penalty units

- (5) An independent valuation of current market rent that is carried out by both specialist retail valuers is to –
- (a) be in writing; and
 - (b) contain detailed reasons for the specialist retail valuers' determination; and
 - (c) specify the matters to which the valuers' had regard in making the valuation and determination of the current market rent.

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- (6) The specialist retail valuers appointed under this section, to undertake an independent valuation of current market rent, must carry out that valuation no later than one month after accepting the appointment.
- (7) If the specialist retail valuers cannot agree on the amount of the independent valuation of current market rent carried out for the purposes of this section, the original valuation made in accordance with section 42 stands.
- (8) The parties to a retail lease are to pay in equal shares the costs of a review of a valuation under this section.

44. Exercise of options to renew retail leases

- (1) A lease which includes an option to renew is to specify the period for which the renewed lease may apply.
- (2) If an option to renew is to be exercised at current market rent, the tenant, no less than 4 months or more than 6 months before the expiry of the period, specified in the lease, within which the option may be exercised, may request the landlord state the proposed rent to apply from the commencement of the new lease period.
- (3) A request under subsection (2) is to be in writing.
- (4) If a request is made under subsection (2), the landlord is to give written notice of the amount of the proposed rent not less than 3 months

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before the expiry of the period to exercise the option.

- (5) Within 30 days after receiving the landlord's notice under subsection (4), the tenant is to notify the landlord that the tenant –
 - (a) exercises the option at the rent proposed; or
 - (b) does not agree with the rent proposed, but wishes to negotiate an amount in accordance with section 42; or
- (6) If a landlord fails to comply with this section, the rent to apply in the first year of the new lease period is to be determined in accordance with section 42.
- (7) If a tenant fails to comply with this section, the rent proposed by the landlord is to be the rent that is payable in the first year of the new lease period.
- (8) If a tenant does not make a request under subsection (2), or notifies the landlord that he or she wishes to negotiate the rent under subsection (5)(b), the landlord and tenant may agree at any time before the option is due to be exercised what rent is to apply in the first year of the new lease period.
- (9) If a landlord and tenant cannot agree on the rent to apply under an option, either party may initiate an independent valuation in accordance with section 42 before the expiry of the period within which the option may be exercised.

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- (10) A landlord may refuse to grant a new lease if –
- (a) the tenant does not exercise the option by the required date; or
 - (b) at the time of exercising the option or before the commencement of the new lease, the tenant is in default under the existing lease.

45. Meaning of *turnover rent*

- (1) A provision in a retail lease that specifies that the rent is to be determined either fully or partly by reference to the turnover in relation to the retail premises is void unless the lease specifies how the rent is to be so determined.
- (2) For the purposes of any provision of a retail lease that relates to the determination of rent or a component of rent by reference to the turnover in relation to the retail premises, turnover does not include any of the following items:
 - (a) any loss incurred in the resale or disposal of goods reasonably and properly purchased from a customer as a trade-in in the usual course of business;
 - (b) any deposit or instalment received on account of a lay-by, hire-purchase or credit sale which is refunded to a customer;
 - (c) any payment for merchandise or services that is refunded;

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- (d) any services, finance or interest charge payable by the tenant to any financier in connection with provision of credit to a customer, other than a commission on credit or store cards;
 - (e) the exchange of merchandise between retail premises of the tenant if the exchange is made solely for the convenient operation of the business of the tenant and not for the purpose of consummating a sale made at the premises;
 - (f) any return to a shipper, wholesaler or manufacturer;
 - (g) any sale of the tenant's fixtures and fittings after their use in the conduct of the business at the premises;
 - (h) any discount allowed to customers in the normal course of business;
 - (i) any uncollected credit account that is written off;
 - (j) any purchase tax, receipt tax or other similar tax imposed on the purchase price or cost of hire of merchandise or services at the point of sale or hire;
 - (k) any delivery charge;
 - (l) any sale of lottery tickets or similar tickets other than commissions.

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- (3) A landlord may require that the turnover figures provided by a tenant be audited.
- (4) If an audit reveals the initial information provided by the tenant to be at least 95% accurate, the cost of the audit is to be borne by the landlord.
- (5) If the audit reveals the initial information provided by the tenant to be less than 95% accurate, the cost of the audit is to be borne by the tenant.

46. Meaning of *special rent*

- (1) A tenant and a landlord may agree to a special rent, in addition to any other rent, to cover the cost of fit-out, fixtures, fittings and equipment installed or provided by the landlord at the landlord's expense.
- (2) An agreement under subsection (1) is to be in writing.
- (3) If a landlord requires a bank guarantee, the amount of the guarantee must not exceed the cost incurred by the landlord under subsection (1).

47. Meaning of *base rent*

For the purposes of any provision of a retail lease that relates to the determination of rent or a component of rent by reference to the base rent, base rent means rent, or that component of rent, which comprises an amount of money that is

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specified in the retail lease, whether or not there is provision in the retail lease for the amount of base rent to change.

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Part 6 – Alterations, Refurbishment, Relocation and Other Interferences

**PART 6 – ALTERATIONS, REFURBISHMENT,
RELOCATION AND OTHER INTERFERENCES**

48. Tenants to be given notice of alterations and refurbishments

- (1) Subject to subsection (3), a retail lease is taken to provide that a landlord must not commence an alteration or refurbishment of the building, of which the retail premises forms a part, that is likely to adversely affect the business of the tenant, unless –
 - (a) the landlord has notified the tenant in writing of the proposed alteration or refurbishment at least 6 months before it is commenced; or
 - (b) the alteration or refurbishment is necessary because of an emergency and the landlord has given the tenant the maximum period of notice that is reasonably practicable in the circumstances.
- (2) A landlord must not commence an alteration or refurbishment of a building, as referred to in subsection (1), unless the landlord has provided notice to the tenant in accordance with that subsection.

Penalty: Fine not exceeding 100 penalty units.

- (3) This section does not apply to routine maintenance or routine repairs.

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49. Tenants to be compensated for disturbances

- (1) A landlord is liable to pay to a tenant reasonable compensation for loss or damage (other than nominal damage) suffered by the tenant because the landlord or a person acting on the landlord's behalf –
- (a) substantially inhibits the tenant's access to the retail premises; or
 - (b) unreasonably takes action that substantially inhibits or alters the flow of customers to the retail premises; or
 - (c) unreasonably takes action that causes significant disruption to the tenant's trading at the retail premises; or
 - (d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or
 - (e) fails to rectify as soon as practicable –
 - (i) any breakdown of plant or equipment that is not under the tenant's care or maintenance; or
 - (ii) any defect in the retail premises or in the building of which the retail premises forms a part, other than a defect due to a condition that would have been reasonably apparent to the tenant when entering into or renewing the

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retail lease or when the tenant accepted the assignment of the lease; or

- (f) neglects adequately to clean, maintain or repair the building of which the retail premises forms a part (but not the retail premises itself); or
 - (g) acts in a manner which, in all the circumstances, is unconscionable; or
 - (h) terminates a lease dishonestly, maliciously or for a purpose that is not genuine; or
 - (i) causes the tenant to vacate the premises during the term of the retail lease or any renewal of it.
- (2) A tenant must give a landlord written notice of the loss or damage as soon as practicable after it is suffered, but a failure to do this does not affect any right of the tenant to compensation.
- (3) A retail lease may include a provision preventing or limiting a claim for compensation under this section in respect of a particular occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the retail lease was entered into.
- (4) This section does not apply to an action taken by a landlord –
- (a) as a reasonable response to an emergency situation; or

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- (b) in compliance with a duty imposed by or under an Act or resulting from a requirement imposed by a body acting, or purportedly acting, under the authority of an Act.
- (5) The amount of the compensation is the amount that is –
 - (a) agreed between the landlord and the tenant; or
 - (b) if there is no agreement, determined under Part 11.

50. Relocation of retail premises

- (1) A retail lease is taken to include the matters set out in this section if the lease provides for the –
 - (a) relocation of the tenant’s business during the term of the retail lease; or
 - (b) termination of the retail lease and offer of a new retail lease of alternative retail premises during the term of the retail lease.
- (2) A landlord cannot require a tenant’s business to be relocated, or offer a new lease of alternative retail premises, unless the landlord has given the tenant a notice of the relocation or offer (a ***relocation notice***) that complies with this section.
- (3) A relocation notice must state each of the following:

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- (a) sufficient details of a proposed refurbishment, redevelopment or extension that are sufficient to indicate a genuine proposal that –
 - (i) is to be carried out within a reasonably practicable time after the relocation of the tenant's business; and
 - (ii) cannot be practicably carried out without vacant possession of the tenant's retail premises;
 - (b) sufficient details of an alternative retail premises (the *alternative premises*) to be made available to the tenant that is, in both its area and configuration, materially similar to, or better than, the existing leased retail premises;
 - (c) the day by which the tenant must vacate the existing leased retail premises (the *relocation day*).
- (4) Unless otherwise agreed to in writing between a landlord and a tenant, a relocation notice must be given to the tenant at least 3 months before the relocation day specified in the notice.
- (5) A tenant is to be offered a new lease of the alternative premises on the same, or better, terms and conditions as the existing retail lease except that the term of the new lease is to be no shorter than the remainder of the term of the existing retail lease.

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- (6) If a tenant gives a landlord a written notice of termination within one month after being given a relocation notice by the landlord, the retail lease terminates 3 months after the relocation notice was given or at such other time as the landlord and the tenant agree in writing.
- (7) If a tenant does not give a notice of termination in accordance with subsection (6), the tenant is taken to have accepted the offer of a new lease on the alternative premises –
- (a) on the terms and conditions referred to in subsection (5); or
 - (b) on the terms and conditions that are agreed by the landlord and tenant.
- (8) A landlord is to pay a tenant's reasonable cost of the relocation including (but not limited to) –
- (a) costs incurred by the tenant in dismantling fittings, equipment or services; and
 - (b) costs incurred by the tenant in replacing, re-installing or modifying finishes, fittings, equipment or services to the standard existing in the existing retail premises immediately before the relocation, but only to the extent that they are reasonably required in the alternative premises; and
 - (c) packaging and removal costs incurred by the tenant; and

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- (d) any actual reduction in, or loss of, profit incurred by the tenant for the period during which the retail premises are closed for the purposes of the relocation; and
 - (e) legal costs incurred by the tenant in relation to the relocation.
- (9) If a landlord and a tenant cannot agree on the amount to which the tenant is entitled under subsection (8), that amount is to be determined under Part 11.
- (10) If a landlord has required a tenant to relocate without offering a tenant a new lease of an alternative premises in accordance with this section, the landlord is liable to pay to the tenant such reasonable compensation as is agreed in writing between the landlord and the tenant, or an amount that is determined under Part 11.

51. Geographical restrictions

- (1) A provision of a retail lease is void to the extent that it has the effect of preventing or restricting a tenant from carrying on business outside of a retail shopping centre, either during the term of the lease or after the expiry of the lease.
- (2) Subsection (1) does not apply to a provision of a lease that prevents the use of the name of the retail shopping centre in connection with a business carried on outside the shopping centre.

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52. Associations representing tenants

A provision of a retail lease is void to the extent that it has the effect of preventing or restricting a tenant from joining, forming or taking part in the activities of an association to represent or protect the interests of tenants.

53. Employment restrictions

A provision of a retail lease is void to the extent that it limits or has the effect of limiting a tenant's right to employ persons of the tenant's own choosing.

54. Indemnities

A provision of a retail lease is void if it purports to indemnify, or requires a tenant to indemnify, a landlord against any action, liability, penalty, claim or demand to which the landlord would otherwise be liable.

PART 7 – ASSIGNMENTS

55. Tenants may request landlord's consent to assign retail lease

- (1) A tenant may make a request to a landlord for the landlord's consent to the assignment of a retail lease.
- (2) Subject to subsection (3), a request made to a landlord under subsection (1) must –
 - (a) be in writing; and
 - (b) include such information as the landlord may reasonably require to be reasonably satisfied about the purpose for which the proposed assignee proposes to use the retail premises; and
 - (c) include such information as the landlord may reasonably require to be satisfied that the financial resources and business experience of the proposed assignee are not inferior to those of the tenant.
- (3) Before making a request to a landlord under subsection (1), a tenant must give the proposed assignee –
 - (a) a copy of the most recent landlord's disclosure statement given to the tenant concerning the retail lease; and
 - (b) details of any changes of which the tenant is aware, or could reasonably be expected to be aware, that have affected

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the information in the landlord's disclosure statement since it was given to the tenant; and

- (c) details of the legal liability of the tenant or of a guarantor of the tenant under the retail lease that is proposed to be assigned; and
 - (d) details of any legal liability of the tenant or of a guarantor of the tenant that may continue if the retail lease is assigned as proposed.
- (4) For the purpose of enabling a tenant to comply with subsection (3), the tenant may request a landlord to give the tenant an updated landlord's disclosure statement that is current from a specified date that is within 3 months before the updated landlord's disclosure statement is given to the tenant by the landlord.
- (5) If requested to do so under subsection (4), the landlord must give the tenant the updated landlord's disclosure statement within 14 days after receiving the request.

Penalty: Fine not exceeding 10 penalty units.

- (6) If the landlord does not give the tenant an updated landlord's disclosure statement within 14 days as required under subsection (5), it is sufficient compliance with subsection (3) for the tenant to provide the proposed assignee with an updated disclosure statement completed by the tenant to the best of the tenant's knowledge.

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- (7) Subject to section 56 and within 28 days after a landlord receives a request from a tenant in accordance with subsection (1), the landlord must –
- (a) consent to the proposed assignment of the retail lease and give the tenant written notice that the landlord has consented to the proposed assignment of the retail lease; or
 - (b) refuse to consent to the proposed assignment of the retail lease and give the tenant a written statement of the grounds on which consent is refused.
- (8) A landlord is taken to have consented to the proposed assignment of a retail lease if –
- (a) the tenant has complied with this section; and
 - (b) the landlord has not, within 28 days after receiving a request from a tenant in accordance with subsection (1), given written notice to the tenant consenting to, or a written statement refusing to consent to, the proposed assignment of the lease.
- (9) A retail lease that is assigned in accordance with this section continues on the same terms and conditions to which the lease was subject before the assignment and a new retail lease is not created by virtue of the assignment of the retail lease.

56. Landlords can withhold consent to assignments

- (1) A landlord is entitled to withhold consent to the assignment of a retail lease in any one or more of the following circumstances (and is not entitled to unreasonably withhold that consent in any other circumstances):
- (a) if the proposed assignee proposes to use the retail premises in a way that is not permitted under the retail lease, provided that the landlord does not unreasonably frustrate the use of the lettable area of the retail premises;
 - (b) if the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to be able to meet the financial obligations of the tenant under the retail lease;
 - (c) if the landlord considers that the proposed assignee does not have the retailing skills that will enable the assignee to fulfil all the obligations of the retail lease;
 - (d) if the proposed assignor has not complied with the reasonable assignment provisions of the retail lease.
- (2) This section does not preclude the right of a landlord to require payment of a reasonable sum in respect of legal or other expenses incurred by the landlord in connection with the consent to the assignment of a retail lease, so long as the

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landlord has substantiated those expenses to the tenant at the request of the tenant.

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Part 8 – Renewal and Termination of Retail Leases

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**PART 8 – RENEWAL AND TERMINATION OF
RETAIL LEASES**

57. Renewal of retail leases

- (1) This Part applies to a retail lease under which an option exists to renew or extend the lease, with or without a rent review.
- (2) A retail lease that does not provide for an option to renew or extend the lease, with or without a rent review, expires in accordance with the provisions of that retail lease.
- (3) If, after a retail lease has expired, the parties to the retail lease wish to enter into a new retail lease, the new lease is subject to the provisions of this Act as if the lease were being entered into by the landlord and the tenant for the first time.

58. Notice of landlord's intentions at end of retail leases

- (1) Not less than 6 months, and not more than 12 months, before the expiry of a retail lease, a landlord must, by written notice to the tenant –
 - (a) offer the tenant a renewal or extension of the retail lease on the terms (including terms as to rent) and conditions specified in the notice; or
 - (b) inform the tenant that the landlord does not propose to offer the tenant a renewal or extension of the retail lease.

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- (2) An offer made to a tenant under subsection (1)(a) cannot be revoked by the landlord until 30 days after the offer is made.
- (3) A tenant cannot be required to pay a premium for the renewal or extension of a retail lease.

59. Termination or expiry of retail leases

- (1) A retail lease may be terminated at any time before its expiry by written agreement between a landlord and a tenant.
- (2) If a landlord has informed a tenant under section 58(1)(b) that a retail lease is not to be renewed or extended, the landlord must, by written notice to the tenant at least 3 months before the expiry of the lease, inform the tenant –
 - (a) of the date on which the retail lease is to expire; and
 - (b) that the tenant is to vacate the premises specified in the lease on, or before, the date specified in paragraph (a) in respect of the retail lease.

Penalty: Fine not exceeding 10 penalty units.

- (3) A tenant of retail premises is required to vacate the retail premises in the manner, and leave the retail premises in the condition –
 - (a) that is stated in the retail lease for the premises; or

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- (b) that is agreed to between the landlord and the tenant.

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**PART 9 – RETAIL SHOPPING CENTRES –
ADDITIONAL REQUIREMENTS**

60. Part applies only to retail shopping centres

This Part applies only to retail leases of retail premises located in retail shopping centres and, in respect of those leases, applies in addition to the other provisions of this Act.

61. Trading hours

- (1) A landlord must, in a lease for retail premises that are located in a retail shopping centre, specify the core trading hours during which all of the business premises in the retail shopping centre, including the retail premises, must be open for trading.

Penalty: Fine not exceeding 10 penalty units.

- (2) A retail lease is taken to include a provision to the effect that the landlord is not entitled to change the core trading hours of the retail shopping centre of which the retail premises forms a part except with the approval in writing of a majority of the tenants of the retail premises in the retail shopping centre.
- (3) This section does not prevent a retail lease from including provisions enabling the landlord to consent to the tenant trading outside core trading hours, and as a condition of granting that consent to the tenant, to require the tenant to pay, or pay a contribution towards, the cost of opening the

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Part 9 – Retail Shopping Centres – Additional Requirements

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retail shopping centre during those agreed extended trading hours.

62. Advertising, promotion and marketing requirements

- (1) A retail lease must include a provision detailing all expenditure incurred or to be incurred by a landlord on account of advertising, promotion and marketing costs to which the tenant is required to contribute under the retail lease.
- (2) A tenant is not required to make a payment to the landlord for advertising, promotion and marketing costs incurred or to be incurred by a landlord unless details of those costs are specified in both the landlord's disclosure statement and the retail lease.

63. Termination for inadequate sales prohibited

A provision in a retail lease is void to the extent that it permits or otherwise provides for the termination of the lease on the ground that a tenant or the business of the tenant has failed to achieve specified sales or turnover performance.

**PART 10 – UNCONSCIONABLE, MISLEADING OR
DECEPTIVE CONDUCT**

64. Court may determine claims of unconscionable conduct

- (1) A landlord or a tenant who suffers loss or damage as a result of the unconscionable conduct of another person in contravention of section 65 or 66 may apply to a court of competent jurisdiction to recover the amount of the loss or damage from the other person.
- (2) In determining whether section 65 or 66 has been contravened, the court –
 - (a) must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

65. Unconscionable conduct of landlords

- (1) A landlord must not, in connection with a retail lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a landlord has contravened subsection (1) in connection with a retail lease,

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the court may have regard to the following matters:

- (a) the relative strengths of the bargaining positions of the landlord and the tenant;
- (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord.

66. Unconscionable conduct of tenants

- (1) A tenant must not, in connection with a retail lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a tenant has contravened subsection (1) in connection with a retail lease, the court may have regard to the following matters:
 - (a) the relative strengths of the bargaining positions of the tenant and the landlord;
 - (b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the tenant.

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Part 10 – Unconscionable, Misleading or Deceptive Conduct

67. Misleading or deceptive conduct

- (1) A party to a retail lease must not, in connection with the lease, engage in conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease.

Penalty: In the case of –

- (a) a body corporate, a fine not exceeding 300 penalty units; and
 - (b) an individual, a fine not exceeding 100 penalty units.
- (2) Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a party to a retail lease has contravened subsection (1) in connection with the lease, the court may have regard to the following matters:
- (a) whether any conduct engaged in by a party to the retail lease resulted in the creation of a false impression by another party to the lease;
 - (b) whether a party to the retail lease hid any information in relation to the lease from another party to the lease;
 - (c) whether a party to the retail lease made any claims in relation to that lease that the party knew, or ought to have known, were false.

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- (3) In determining whether subsection (1) has been contravened –
- (a) a court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) a court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.
- (4) A landlord or a tenant who suffers loss or damage as a result of the misleading or deceptive conduct of another person in contravention of subsection (1) may apply to a court of competent jurisdiction to recover the amount of the loss or damage from the other person.

PART 11 – DISPUTE RESOLUTION

Division 1 – Preliminary matters

68. Interpretation

(1) In this Part –

application, in relation to a retail tenancy dispute, means an application for the mediation of the dispute that is made to the Director in accordance with section 73;

mediation of a retail tenancy dispute includes preliminary assistance in dispute resolution such as the giving of advice to ensure that –

- (a) the parties to the dispute are fully aware of their rights and obligations; and
- (b) there is full and open communication between the parties about the dispute;

retail tenancy dispute – see section 70.

- (2) A reference in this Part to a party to a retail lease or to a former party to a retail lease includes a reference to a person who is or was a guarantor or covenantor under a retail lease or under a former retail lease.
- (3) A reference in this Part to a retail lease includes a reference to a former retail lease.

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- (4) A reference in this Part to a party to a retail lease includes a reference to a former party to a retail lease.

69. Parties' rights under this Part preserved

To remove any doubt, if a provision of a retail lease requires or permits a dispute under or about the retail lease to be referred to arbitration or be heard by any court or tribunal, the provision does not limit a party's rights under this Part.

70. Meaning of *retail tenancy dispute*

- (1) In this Part, a reference to a retail tenancy dispute means a dispute concerning the liabilities or obligations of a party to a retail lease that arose –
- (a) under or in relation to the retail lease; or
 - (b) in connection with the use or occupation of the retail premises to which the retail lease relates.
- (2) The following disputes are not retail tenancy disputes for the purposes of this Part:
- (a) a dispute in relation to unconscionable conduct mentioned in Part 10;
 - (b) a dispute in relation to misleading or deceptive conduct mentioned in Part 10.

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Part 11 – Dispute Resolution

71. Appointment of qualified mediators

- (1) The Director is to determine the qualifications necessary to enable a person to seek to resolve, by mediation, retail tenancy disputes.
- (2) The Director may appoint the number of persons, with the qualifications determined by the Director under subsection (1), that the Director considers necessary to be mediators.
- (3) A mediator's function is to seek to resolve, by mediation, retail tenancy disputes.
- (4) A mediator is not civilly or criminally liable in respect of the performance, in good faith, of the functions of a mediator.

Division 2 – Mediation of retail tenancy disputes

72. Attempted resolution of retail tenancy disputes

- (1) The parties to a retail lease must attempt to resolve any retail tenancy dispute between them by direct negotiation.
- (2) If the parties to a retail lease fail to resolve a retail tenancy dispute by direct negotiation, either party may make an application to the Director for the mediation of the dispute and attempt to negotiate a mutually acceptable resolution.

73. Application for mediation of retail tenancy disputes

- (1) An application to the Director by a party to a retail lease for the mediation of a retail tenancy dispute must –
- (a) be made in writing; and
 - (b) be accompanied by the prescribed fee; and
 - (c) contain a brief summary of the actions taken by the parties to the retail lease to attempt to resolve the retail tenancy dispute by direct negotiation; and
 - (d) contain a brief summary of the nature of the retail tenancy dispute; and
 - (e) briefly set out the facts relevant to the retail tenancy dispute.
- (2) An application may not be made more than 3 years after the date on which the liability or obligation that is the subject of the application arose.

74. Director to give notice of mediation

- (1) As soon as practicable after an application is made to the Director, the Director must –
- (a) accept the application; or
 - (b) refuse to accept the application.

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Part 11 – Dispute Resolution

- (2) If the Director accepts an application under subsection (1)(a), as soon as practicable after that application is accepted, the Director must –
- (a) nominate a mediator to mediate the retail tenancy dispute; and
 - (b) give written notice to the parties to the retail tenancy dispute setting out –
 - (i) the mediator nominated to mediate the dispute; and
 - (ii) the time, date and place of the mediation conference to be conducted by the mediator; and
 - (iii) a brief description of the nature of the application.
- (3) A mediation conference date must be at least 7 days after the written notice is given in accordance with subsection (2)(b).
- (4) The Director may only refuse to accept an application under subsection (1)(b) if the Director is satisfied that –
- (a) the party to the retail lease making the application has not reasonably attempted to resolve the retail tenancy dispute; or
 - (b) the application does not contain relevant grounds for the retail tenancy dispute; or
 - (c) the application is frivolous or vexatious.

75. Limited right of representation

At a mediation conference, each party to the retail tenancy dispute –

- (a) must conduct the party's own case; and
- (b) may be represented by an agent approved by the mediator only if –
 - (i) the party is a corporation; or
 - (ii) the mediator is satisfied that an agent should be permitted to represent the party.

76. Mediation conferences to be held in private

A mediation conference is not to be open to the public.

77. Cost of mediation to be met by parties

The costs of and associated with a mediation conference (including the fees and expenses of the mediator) are –

- (a) to be determined by the mediator; and
- (b) to be paid by the parties to the application –
 - (i) in the proportions agreed between the parties; or
 - (ii) if there is no such agreement, in equal shares.

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Part 11 – Dispute Resolution

78. Agreements reached at mediation conferences

- (1) The parties to a retail tenancy dispute have not more than 20 days from the date of the mediation conference for the dispute to reach an agreement on the resolution of the dispute.
- (2) An agreement on the resolution of a retail tenancy dispute that is made at a mediation conference must be put into writing and be signed by or for the parties to the dispute.
- (3) A mediator must give a copy of a signed mediation agreement to the Director as soon as practicable after it is signed by or for the parties to the retail tenancy dispute.

79. Failure to reach resolution at mediation conferences

If the parties to a retail tenancy dispute do not resolve the matters in dispute at a mediation conference held in accordance with this Part –

- (a) the mediator must inform the Director of that fact; and
- (b) either party to the retail tenancy dispute may refer the dispute to a prescribed body or prescribed person.

PART 12 – MISCELLANEOUS

80. Infringement notices

(1) In this section –

infringement offence means an offence against this Act or the regulations that is prescribed to be an infringement offence.

(2) An authorised person may issue and serve an infringement notice on a person if he or she reasonably believes that the person has committed an infringement offence.

(3) An infringement notice may not be served on an individual who has not attained the age of 16 years.

(4) An infringement notice –

(a) is to be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005*; and

(b) is not to relate to 4 or more offences.

(5) The regulations –

(a) may prescribe the penalty applicable to each infringement offence that is payable under an infringement notice; and

(b) may prescribe different penalties for bodies corporate and individuals.

81. Prosecution of offences

Proceedings for an offence against this Act or the regulations are to be commenced by the Director within the period of 2 years from the date on which evidence of the alleged offence first came to the attention of the Director.

82. Protection from liability

- (1) This section applies to a person who is or has been –
 - (a) the Director; or
 - (b) a delegate of the Director; or
 - (c) an authorised person; or
 - (d) a mediator; or
 - (e) a valuer, including a specialist retail valuer.
- (2) A person referred to in subsection (1) is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise or purported exercise of a power, or in the performance of a function, under this Act.
- (3) Subsection (2) does not affect any liability that the State would, apart from that subsection, have for an act or omission.

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Part 12 – Miscellaneous

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83. Regulations

- (1) The Governor may make regulations for the purposes of this Act.
- (2) Without limiting the generality of subsection (1), the Governor may make regulations for, or in respect of, the following matters:
 - (a) any matter in respect of the types of business to which the Act applies or does not apply;
 - (b) any matter in respect of the premises to which the Act applies or does not apply;
 - (c) any matter in respect of the lease arrangements to which the Act applies or does not apply;
 - (d) any matter in respect of the tenants to which the Act applies or does not apply;
 - (e) all other matters that are required, permitted, or necessary, to be prescribed under this Act.
- (3) The regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.
- (4) The regulations may –
 - (a) provide that a contravention of, or a failure to comply with, any of the regulations is an offence; and

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- (b) in respect of such an offence, provide for the imposition of a fine not exceeding 250 penalty units.
- (5) The regulations may –
 - (a) authorise any matter to be determined, applied or regulated by a person or entity specified in the regulations; and
 - (b) confer a power or impose a duty on a specified person, entity or class of persons or class of entities.
- (6) The regulations may adopt or incorporate the whole or part of any standard, rule, code, specification, guidelines, program, scheme or plan, as amended from time to time, with or without modification, issued, prescribed, made or published by any person or entity (including the Crown) before or after the regulations take effect.
- (7) The regulations may exempt a person, class of persons, matter or other thing from the operation of this Act or any specified provision of this Act or the regulations including, but not limited to, an exemption from any fee, charge or levy payable under this Act.
- (8) The regulations may –
 - (a) provide for savings or transitional matters necessary or expedient for bringing this Act into operation; and

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- (b) provide for any of those savings or transitional matters to take effect on the day on which the first provision of this Act commences or on a later day specified in the regulations, whether the day so specified is before, on or after the day on which the regulations are made.

84. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Workplace Safety and Consumer Affairs; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.