

# Commercial Tenancy (Retail Shops) Amendment Bill 2009

---

## CONTENTS

---

<b>Part 1 — Preliminary</b>		
1.	Short title	2
2.	Commencement	2
<b>Part 2 — Amendments to the <i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i></b>		
3.	Act amended	3
4.	Section 3 amended	3
5.	Section 7 replaced	3
	7. Rent based on turnover	3
6.	Section 8 amended	4
7.	Section 11 amended	5
8.	Section 12C replaced	5
	12C. Hours of operation	5
9.	Section 13B replaced	7
	13B. Notice to tenant of landlord's intentions at end of lease	7
10.	Section 13C inserted	8
	13C. Negotiations for renewal or extension of lease	8
11.	Section 14A inserted	9
	14A. Commissioner for Small Business to be notified of lease	9
12.	Part IIB heading and sections 15G, 15H, 15I and 15J inserted	10
<b>Part IIB — Commissioner for Small Business</b>		
	15G. Functions of Commissioner for Small Business	10

**Commercial Tenancy (Retail Shops) Amendment Bill 2009**

Contents

---

15H.	Commissioner may decline to take further action	13
15I.	References to the Tribunal	13
15J.	Reference to Tribunal at requirement of referring party or parties	15

Western Australia

LEGISLATIVE ASSEMBLY

*(Introduced by Hon Fran Logan, MLA)*

**Commercial Tenancy (Retail Shops)  
Amendment Bill 2009**

**A Bill for**

***An Act to amend the *Commercial Tenancy (Retail Shops) Agreements Act 1985* to supplement the rights of tenants and enhance the effectiveness of the Act.***

The Parliament of Western Australia enacts as follows:

1

## **Part 1 — Preliminary**

2

### **1. Short title**

3

This Act is the *Commercial Tenancy (Retail Shops) Amendment Act 2009*.

4

5

### **2. Commencement**

6

This Act comes into operation as follows —

7

(a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;

8

9

(b) the rest of the Act — on the day fixed by proclamation.

1           **Part 2 — Amendments to the *Commercial Tenancy***  
2                           ***(Retail Shops) Agreements Act 1985***

3   **3.       Act amended**

4           This Part amends the *Commercial Tenancy (Retail Shops)*  
5           *Agreements Act 1985*.

6   **4.       Section 3 amended**

7           In section 3 (1) insert in alphabetical order:

8  
9           ***Commissioner*** means the person designated as the  
10           Commissioner by notice published in the *Gazette* by the  
11           Minister under section 15 of the *Consumer Affairs Act 1971*;  
12           ***Commissioner for Small Business*** is the title specified by the  
13           Minister, by notice in the *Gazette*, by which the Commissioner  
14           is to be referred when performing functions under this Act;  
15

16   **5.       Section 7 replaced**

17           Delete section 7 and insert:

18  
19   **7.       Rent based on turnover**

20           (1) Subject to this section, where a retail shop lease  
21           contains a provision to the effect that the rent is to be  
22           determined either in whole or in part by reference to  
23           the turnover of the business, the provision is void.

24           (2) Subject to this section, it is an offence for a landlord  
25           to —

26                   (a) enter into a retail shop lease containing a  
27                   provision of the kind referred to in  
28                   subsection (1); or

**Commercial Tenancy (Retail Shops) Amendment Bill 2009**

**Part 2** Amendments to the Commercial Tenancy (Retail Shops) Agreements Act 1985

**s. 6**

---

- 1 (b) use the turnover of the business for the purpose  
2 of determining rent.  
3 Penalty: Not less than \$10,000 and not more than  
4 \$100,000.
- 5 (3) Notwithstanding subsections (1) and (2) above, rent  
6 may be determined either in whole or in part by  
7 reference to the turnover of the business where —
- 8 (a) a tenant gave notice in writing to a landlord that  
9 the tenant agreed and elected that the rent  
10 should be determined, either in whole or in  
11 part, by reference to the turnover of the  
12 business; and
- 13 (b) that notice was given to the landlord before a  
14 provision of the kind referred to in  
15 subsection (1) was included in the lease.  
16

17 **6. Section 8 amended**

- 18 (1) In section 8 (1) —
- 19 (a) delete “**generally**” from the heading; and  
20 (b) delete all words after “void”.
- 21 (2) Delete section 8 (2) and insert:  
22
- 23 (2) It is an offence for a landlord to —
- 24 (a) enter into a retail shop lease containing a  
25 provision of the kind referred to in  
26 subsection (1); or
- 27 (b) require a tenant to furnish figures or statements  
28 relating to the turnover of the business.
- 29 Penalty: Not less than \$10,000 and not more than  
30 \$100,000.  
31

1       (3) After section 8(2), insert:

2

3               (3) Nothing in this section prevents a tenant from  
4               voluntarily furnishing figures or statements relating to  
5               the turnover of the business to a landlord.

6

7       **7. Section 11 amended**

8               In section 11(5) —

9               (a) delete “where —” and insert a full stop;

10              (b) delete paragraphs (a) and (b); and

11              (c) delete “but otherwise such a question shall not be  
12              referred to the Tribunal.”.

13       **8. Section 12C replaced**

14               Delete section 12C and insert:

15

16       **12C. Hours of operation**

17              (1) A provision in a retail shop lease which requires a  
18              tenant to —

19              (a) open the retail shop the subject of the lease at  
20              specified hours or specified times; or

21              (b) pay outgoings in respect of any time during  
22              which the retail shop is not open for business,

23              is void.

24              (2) Where a landlord has requested or has otherwise  
25              engaged in conduct to induce a tenant to —

26              (a) open the retail shop the subject of the retail  
27              shop lease at specified hours or specified times;  
28              or

**s. 8**

---

- 1 (b) renew a retail shop lease containing a provision  
2 that requires the tenant to —  
3 (i) open the retail shop the subject of the  
4 retail shop lease at specified hours or  
5 specified times; or  
6 (ii) pay outgoings in respect of any time  
7 during which the retail shop was not  
8 open for business,  
9 the tenant may refer the matter to the  
10 Commissioner for Small Business.
- 11 (3) Where —  
12 (a) a landlord has refused to renew a retail shop  
13 lease; and  
14 (b) the tenant under the retail shop lease believes  
15 that the refusal was because the tenant did  
16 not —  
17 (i) open the retail shop the subject of the  
18 lease at specified hours or specified  
19 times; or  
20 (ii) pay outgoings in respect of any time  
21 during which the retail shop was not  
22 open for business,  
23 the tenant may apply in writing to the Tribunal  
24 for an order that the landlord pay compensation  
25 to the tenant in respect of the pecuniary loss  
26 suffered by the tenant as a result of the failure  
27 to renew the retail shop lease.  
28



1 **9. Section 13B replaced**

2 Delete section 13B and insert:

3

4 **13B. Notice to tenant of landlord's intentions at end of**  
5 **lease**

- 6 (1) Not less than 3 months and not more than 12 months  
7 before the expiry of a lease, the landlord must by  
8 written notification to the tenant either —
- 9 (a) offer the tenant a renewal or extension of the  
10 lease on the proposed terms and conditions  
11 specified in the notification (including terms as  
12 to rent); or
- 13 (b) inform the tenant that the landlord does not  
14 propose to offer the tenant a renewal or  
15 extension of the lease.
- 16 (2) An offer made for the purposes of subsection (1)(a) is  
17 not capable of revocation for 1 month after it is made.
- 18 (3) If the landlord fails to give a notification to the tenant  
19 as required by this section, the term of the lease is  
20 extended until the end of 3 months after the landlord  
21 gives the notification required by this section, but only  
22 if the tenant requests that extension by notice in writing  
23 to the landlord given before the lease would otherwise  
24 have expired.
- 25 (4) A landlord is bound by an offer made by him under  
26 subsection (1) to renew or further renew the lease if the  
27 tenant, within 30 days after receiving the offer, gives to  
28 the landlord notice in writing of acceptance of the offer  
29 on the terms and conditions proposed by the landlord.
- 30 (5) A proposal as to rent to be charged which is submitted  
31 to the tenant after he has been given notification under

**s. 10**

---

- 1 subsection (1) is to be taken to be an offer for the  
2 purposes of subsection (4).
- 3 (6) During any extension of the lease under subsection (3),  
4 the tenant may terminate the lease by giving not less  
5 than 1 month's notice of termination in writing to the  
6 landlord.
- 7 (7) This section does not apply to a lease containing an  
8 option to renew or extend the lease or that is the subject  
9 of an agreement for the renewal or extension of the  
10 lease.  
11

12 **10. Section 13C inserted**

13 After section 13B insert:  
14

15 **13C. Negotiations for renewal or extension of lease**

- 16 (1) A landlord of a retail shop must not, by written or  
17 broadcast advertisement, indicate the availability of the  
18 shop for lease or invite tenders or expressions of  
19 interest for tendering, during the term of the lease,  
20 unless —
- 21 (a) the landlord has offered the tenant a renewal or  
22 extension of the lease under section 13B(1)(a),  
23 the offer has not been accepted and (not earlier  
24 than one month after the offer was made) the  
25 landlord by written notice informs the tenant  
26 that negotiations are concluded without result;  
27 or
- 28 (b) the landlord by written notice informs the  
29 tenant that the landlord does not propose to  
30 offer the tenant a renewal or extension of the  
31 lease and there are no arrangements to allow  
32 the tenant to remain in possession of the shop;  
33 or

- 1                   (c) the tenant by written notice informs the  
2                   landlord that the tenant does not wish to enter  
3                   into negotiations for the renewal or extension of  
4                   the lease or that the tenant wishes to withdraw  
5                   from the negotiations; or  
6                   (d) the tenant has vacated or agrees in writing to  
7                   vacate the shop; or  
8                   (e) the tenant consents in writing to publication of  
9                   the advertisement.  
10                  Maximum penalty: \$1,000.
- 11                  (2) This section does not affect the industry practice of  
12                  testing the market, otherwise than by written or  
13                  broadcast advertisement, in connection with the leasing  
14                  of a retail shop.  
15

16   **11.       Section 14A inserted**

17                  After section 14 insert:  
18

19                  **14A.     Commissioner for Small Business to be notified of**  
20                  **lease**

- 21                  (1) Within 14 days (or such other period as is agreed  
22                  between the landlord and the Commissioner for Small  
23                  Business) after a retail premises lease is signed by all  
24                  of the parties to it, the landlord must notify (in writing)  
25                  the Commissioner for Small Business of —  
26                       (a) the address of the retail premises; and  
27                       (b) the landlord's name and address (and, if the  
28                       landlord is not a natural person, the name and  
29                       address of a person who can be contacted about  
30                       the lease); and  
31                       (c) the tenant's name and address; and

**s. 12**

---

- 1 (d) the rental value of the leased area on a cost per  
2 square metre basis; and  
3 (e) such other matters (if any) as are prescribed by  
4 the regulations.

5 Penalty: \$1,000.

- 6 (2) Subject to the exclusion of items (b) and (c), the  
7 information referred to in subclause (1) of this clause is  
8 to be made available to the public.  
9

10 **12. Part IIB heading and sections 15G, 15H, 15I and 15J**  
11 **inserted**

12 After section 15F insert:  
13

14 **Part IIB — Commissioner for Small Business**

15 **15G. Functions of Commissioner for Small Business**

- 16 (1) The Minister is required, by notice published in the  
17 *Gazette* pursuant to section 15(2) of the *Consumer*  
18 *Affairs Act 1971*, to specify that the Commissioner for  
19 Small Business is the title by which the Commissioner  
20 is to be referred when performing functions under this  
21 Act.
- 22 (2) The Commissioner for Small Business has the  
23 following functions under this Act —
- 24 (a) to make arrangements to facilitate the  
25 resolution by mediation, or by another  
26 appropriate form of alternative dispute  
27 resolution, of retail tenancy disputes (whether  
28 or not a dispute has been formally referred  
29 under this Act to the Commissioner for Small  
30 Business);

- 1                   (b) to take proceedings for an offence against this  
2                   Act;
- 3                   (c) to report to the Minister on the operation of this  
4                   Act;
- 5                   (d) to authorise, if the Commissioner for Small  
6                   Business considers it appropriate to do so, a  
7                   body to represent that the form of a standard  
8                   lease that the body is to make available to the  
9                   public (whether or not for a fee) is endorsed by  
10                  the Commissioner for Small Business;
- 11                  (e) to prepare and publish an information booklet  
12                  or guidelines about retail leases that may be  
13                  purchased on demand by members of the  
14                  public;
- 15                  (f) to create and maintain a register of the  
16                  information provided under section 14A;
- 17                  (g) such other functions as may be conferred or  
18                  imposed on the Commissioner for Small  
19                  Business by or under this Act.
- 20                  (3) For the purposes of eliminating conduct contrary to this  
21                  Act in relation to retail shop leases, the Commissioner  
22                  for Small Business may —
- 23                       (a) carry out investigations, research and inquiries  
24                       relating to the conduct of parties to retail shop  
25                       leases who are subject to this Act;
- 26                       (b) acquire and disseminate knowledge on all  
27                       matters relating to retail shop leases;
- 28                       (c) arrange and coordinate consultations, inquiries,  
29                       discussions, seminars and conferences;
- 30                       (d) review, from time to time, the laws of the State;
- 31                       (e) consult with governmental, business, industrial  
32                       and community groups in order to ascertain  
33                       means of improving services and conditions

**s. 12**

---

- 1 affecting persons who are parties to retail shop  
2 leases;
- 3 (f) develop programmes and policies promoting  
4 the achievement of compliance with this Act by  
5 parties to retail shop leases;
- 6 (g) publish any written reports compiled in the  
7 exercise of the powers conferred on the  
8 Commissioner for Small Business by this  
9 section.
- 10 (4) In arranging for the resolution of retail tenancy  
11 disputes, the Commissioner for Small Business is to  
12 have regard to the need for the mediation or other form  
13 of alternative dispute resolution to be conducted by  
14 persons who are experienced in the field of retail shops  
15 leases.
- 16 (5) The Commissioner for Small Business may himself or  
17 herself conduct a mediation or other form of non-  
18 binding alternative dispute resolution in relation to a  
19 matter arising between parties to a retail shop lease  
20 which is subject to this Act.
- 21 (6) Where the parties agree to submit to a binding  
22 arbitration, the Commissioner for Small Business may  
23 himself or herself conduct the arbitration, and the  
24 procedure to be adopted for the purpose of conducting  
25 the arbitration is to be agreed between the parties.
- 26 (7) The Commissioner for Small Business is entitled to be  
27 paid his or her fees and expenses for conducting  
28 alternative dispute resolution in accordance with  
29 subclauses (4) and (5), which must not be more than  
30 the maximum amount (if any) prescribed by the  
31 regulations.
- 32 (8) The Commissioner for Small Business may charge a  
33 fee for giving an authorisation under subsection (1)(d),

1                   which must not be more than the maximum fee (if any)  
2                   prescribed by the regulations.

3           (9)   The Commissioner for Small Business is not subject to  
4           the Minister's control or direction in exercising  
5           functions under subsection (2)(a) or (b) and  
6           subsection (3).

7           **15H.   Commissioner may decline to take further action**

8           (1)   Where, at any stage after the referral of a matter by a  
9           party or parties to a retail shop lease, the Commissioner  
10          for Small Business is satisfied that the referral is  
11          frivolous, vexatious, misconceived, lacking in  
12          substance or relates to an act that is not unlawful by  
13          reason of a provision of this Act, the Commissioner for  
14          Small Business may, by notice in writing addressed to  
15          the party or parties referring the matter, decline to take  
16          any further action in relation to the referral.

17          (2)   The Commissioner for Small Business shall, in a notice  
18          under subsection (1), advise of —

19                  (a)   the reason for declining to take any further  
20                  action; and

21                  (b)   the rights of the party or parties under  
22                  section 15J.

23          **15I.   References to the Tribunal**

24          (1)   Where the Commissioner for Small Business has  
25          conducted mediation or any other form of non-binding  
26          alternative dispute resolution in accordance with  
27          section 15G(4), and the Commissioner for Small  
28          Business —

29                  (a)   is of the opinion that the matter cannot be  
30                  resolved by mediation or any other form of  
31                  non-binding alternative dispute resolution;

**s. 12**

---

- 1 (b) has endeavoured to resolve a matter by  
2 mediation or any other form of non-binding  
3 alternative dispute resolution;
- 4 (c) is of the opinion that the nature of a matter is  
5 such that it should be referred to the Tribunal;  
6 or
- 7 (d) is satisfied that either party has not acted in  
8 good faith to resolve the matter in dispute,
- 9 the Commissioner for Small Business shall refer the  
10 matter to the Tribunal together with a report by the  
11 Commissioner for Small Business relating to the  
12 matter.
- 13 (2) When a matter is referred to the Tribunal under  
14 subsection (1), the Commissioner for Small  
15 Business —
- 16 (a) shall, if the party or parties referring the matter  
17 requests the Commissioner for Small Business  
18 to do so, either personally or by counsel or  
19 representative assist the party in the  
20 presentation of the case of the party to the  
21 Tribunal; and
- 22 (b) may, if the party or parties referring the matter  
23 requests the Commissioner for Small Business  
24 to do so and the Commissioner considers it  
25 appropriate in all circumstances (including the  
26 financial circumstances of the party) to do so,  
27 make such contribution towards the cost of  
28 witness and other expenses as is necessary to  
29 enable the party to call or give, or to call and  
30 give, evidence before the Tribunal.
- 31 (3) The Commissioner for Small Business may, in making  
32 a contribution under subsection (2)(b), make the  
33 contribution subject to such conditions as the  
34 Commissioner for Small Business thinks fit.



- 1           (4) If a condition to which the making of a contribution is  
2           subjected under subsection (3) requires the party to  
3           repay to the Commissioner for Small Business in  
4           circumstances specified in that condition the whole or  
5           any part of the contribution made under subsection  
6           (2)(b) and those circumstances arise, the Commissioner  
7           for Small Business may recover that whole or part from  
8           the party by action in a court of competent jurisdiction  
9           as a debt due to the Commissioner.
- 10           (5) Evidence of anything said or done in the course of non-  
11           binding alternative dispute resolution proceedings shall  
12           not be admissible in subsequent proceedings before the  
13           Tribunal.
- 14           **15J. Reference to Tribunal at requirement of referring**  
15           **party or parties**
- 16           (1) Where the Commissioner for Small Business has given  
17           a notice under section 15H, the party or parties  
18           referring the matter to the Commissioner for Small  
19           Business may, within 21 days after the receipt of that  
20           notice, by notice in writing served on the  
21           Commissioner for Small Business, require the  
22           Commissioner for Small Business to refer the matter to  
23           the Tribunal.
- 24           (2) On receipt of a notice under subsection (1), the  
25           Commissioner for Small Business shall refer the matter  
26           to the Tribunal together with a report relating to the  
27           matter, including the grounds for the Commissioner for  
28           Small Business declining to take any further action.  
29

30

---