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Changes to the Retail Shop Leases Act 1994: the Retail Shop Leases Amendment Bill 2005 (Qld)

The Retail Shop Leases Amendment Bill 2005 (Qld) results from a review of the operation of the Retail Shop Leases Act 1994 (Qld). The Bill introduces changes to the Act mostly relating to establishing mandatory minimum lease standards, as well as enhancing the retail tenancy dispute resolution process.

Mary Westcott

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Research Publications and Resources Section

Ms Karen Sampford, Director	(07) 3406 7116
Mrs Nicolee Dixon, Senior Parliamentary Research Officer	(07) 3406 7409
Ms Renee Giskes, Parliamentary Research Officer	(07) 3406 7241

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Inquiries should be addressed to:

Director, Research Publications & Resources

Queensland Parliamentary Library

Parliament House

George Street, Brisbane QLD 4000

Ms Karen Sampford. (Tel: 07 3406 7116)

Email: Karen.Sampford@parliament.qld.gov.au

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CONTENTS

EXECUTIVE SUMMARY
1 INTRODUCTION.....	1
2 BACKGROUND.....	1
3 RETAIL SHOP LEASES AMENDMENT BILL 2005.....	3
3.1 MANDATORY MINIMUM LEASE STANDARDS	3
3.1.1 Claiming expenses	3
3.1.2 Rent reviews	3
3.1.3 Sinking fund.....	4
3.1.4 Compensation	4
3.1.5 Lease renewal	5
3.1.6 Relocating lessee's business	5
3.1.7 Demolishing building in which lessee's business is situated	6
3.2 RETAIL TENANCY DISPUTE RESOLUTION	6
3.2.1 Time periods	6
3.2.2 Inclusion of parties.....	7
3.2.3 Representation	7
3.2.4 Conciliation.....	7
3.2.5 Errors	8
3.2.6 Costs.....	8
3.2.7 Composition of Tribunal.....	8
3.2.8 Jurisdiction.....	8
3.3 OTHER AMENDMENTS	8
3.3.1 Disclosure Provisions	8
3.3.2 Lessee not liable for assignee's default	9

3.3.3	Definitions	9
3.3.4	Consistency.....	10
3.3.5	Review of the Act.....	10
3.3.6	Application of the proposed changes	10
4	OTHER JURISDICTIONS.....	10
4.1	VICTORIA	11
4.2	NEW SOUTH WALES.....	11
	APPENDIX – AUSTRALIAN RETAIL TENANCY LEGISLATION	12
	RECENT QPL RESEARCH PUBLICATIONS 2005.....	13

EXECUTIVE SUMMARY

The Retail Shop Leases Amendment Bill 2005 (Qld) (the Bill) was introduced into the Queensland Legislative Assembly on 7 June 2005.

The Bill resulted from a review of the *Retail Shop Leases Act 1994* (Qld) (the Act). In drafting the Bill, the government considered the recommendations of an Industry Working Group which reviewed public submissions received during a consultation period (**pages 1-2**).

The Bill amends provisions in the Act concerning disclosure (**pages 7-8**), minimum lease standards (**pages 3-5**) and retail tenancy dispute resolution (**pages 5-7**), as well as making various other amendments (**pages 8-9**).

This Research Brief also briefly discusses retail tenancy legislation in New South Wales and Victoria (**pages 10-11**).

1 INTRODUCTION

The Retail Shop Leases Amendment Bill 2005 (Qld) (the Bill) was introduced into the Queensland Legislative Assembly by the former Minister for State Development and Innovation, the Hon Tony McGrady on 7 June 2005. The objectives of the Bill are to amend the *Retail Shop Leases Act 1994* to:

- establish mandatory minimum lease standards for retail shop leases; and
- enhance the retail tenancy dispute resolution provisions to improve the dispute resolution process for retail tenancy disputes.¹

2 BACKGROUND

A review of the *Retail Shop Leases Act 1994* (Qld) (the Act) was commenced in 2003 to decide whether the Act's provisions remained appropriate.² In September of that year, a Discussion Paper was published by the Department of State Development.³ The government sought written public submissions on the Act, particularly on the issues in the Discussion Paper which had been developed in consultation with "key retail industry groups".⁴ Consultation was conducted throughout the state following release of the Discussion Paper.⁵ Submissions closed on 14 November 2003.⁶ A total of 98 submissions were received during the review process,⁷ of which 64 were in response to the initial Discussion Paper.⁸

¹ Retail Shop Leases Amendment Bill, Explanatory Notes, p 1.

² Section 122 of the Act requires the Minister to carry out a review at an interval of not more than five years after the previous review. The previous review had been carried out in 2000.

³ Department of State Development and Innovation, 'Outcome of the Review of the Retail Shop Leases Act 1994', downloaded 12 July 2005 from website at <http://www.sdi.qld.gov.au>

⁴ Department of State Development, *Review of the Retail Shop Leases Act 1994: Discussion Paper*, September 2003, p 1.

⁵ Department of State Development, *Review of the Retail Shop Leases Act 1994 Policy Review Paper*, September 2004, downloaded 7 March 2003, p 6 from website at <http://www.sd.qld.gov.au>

⁶ Department of State Development, *Review of the Retail Shop Leases Act 1994: Discussion Paper*, September 2003, p 12.

⁷ Department of State Development and Innovation, 'New Retail Legislation to Make Business Fairer', 7 June 2005, last updated 10 June 2005, downloaded 14 June 2005 from website at <http://www.sdi.qld.gov.au>

In December 2003, an Industry Working Group comprising representatives from key stakeholder organisations was appointed by the Minister.⁹ The stakeholder organisations involved were the National Retail Association, the Queensland Retail Traders and Shopkeepers Association, the Queensland Branch of the Property Council of Australia and the Shopping Centre Council of Australia.¹⁰ The Industry Group reviewed the submissions that had been received in response to the Discussion Paper and made recommendations to the Queensland Government.¹¹ Taking into account the recommendations of the Industry Working Group, the government set out its preferred position in a Policy Review Paper which was released for public comment in September 2004. The Bill was drafted after consideration of the public submissions in response to the Policy Review Paper.

The retail industry in Queensland employs approximately 17% of all Queensland employees¹² and the total retail turnover is approximately \$3,175 million per month.¹³ The government considers the retail sector of importance to the Queensland, both in terms of the creation of employment and its contribution to the economy.¹⁴ In introducing changes to the Act, the Hon Tony McGrady, the then Minister for State Development and Innovation, stated that '*the [B]ill refines the existing [A]ct to reflect the changing needs of a dynamic sector.*'¹⁵

⁸ Department of State Development, *Review of the Retail Shop Leases Act 1994 – Discussion Paper Feedback Report*, downloaded 2 August 2005, p 3 from website at <http://www.smartsmallbusiness.qld.gov.au>

⁹ Retail Shop Leases Amendment Bill, Explanatory Notes, p 3.

¹⁰ Retail Shop Leases Amendment Bill, Explanatory Notes, p 2.

¹¹ Department of State Development and Innovation, *Review of the Retail Shop Leases Act 1994: Policy Review Paper*, September 2004, downloaded 12 July 2005, p 3 from website at <http://www.sdi.qld.gov.au>

¹² Australian Bureau of Statistics, *Queensland Labour Force – Employees By Industry*, February 2005, downloaded 12 July 2005 from website at <http://www.abs.gov.au>

¹³ Australian Bureau of Statistics, *Queensland Retail Turnover By Industry*, April 2005, downloaded 12 July 2005 from website at <http://www.abs.gov.au>

¹⁴ Hon Tony McGrady MP, Minister for State Development and Innovation, Retail Shop Leases Amendment Bill 2005 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 7 June 2005, pp 1823-1824, p 1823.

¹⁵ Hon Tony McGrady MP, Minister for State Development and Innovation, Retail Shop Leases Amendment Bill 2005 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 7 June 2005, pp 1823-1824, p 1823.

3 RETAIL SHOP LEASES AMENDMENT BILL 2005

The Bill proposes a number of changes to the *Retail Shop Leases Act 1994* most of which relate to mandatory minimum lease standards and the retail tenancy dispute resolution process.

Clause 8 inserts **proposed new s 13(8)** and **(9)**. The effect of these subsections is that the minimum lease standards, preliminary disclosure about leases and the dispute resolution provisions in the Act do not apply to leases which have a total period of less than six months.

3.1 MANDATORY MINIMUM LEASE STANDARDS

3.1.1 Claiming expenses

Clause 14 inserts **proposed new s 24(1)(c)** which allows a lessor¹⁶ to place a provision in a lease enabling them to claim legal or other expenses which occur as a result of a lessee¹⁷ seeking a variation to the lease or the lessor's consent to enter into a sublease or licence.

3.1.2 Rent reviews

Clause 15 amends section 27 which deals with the timing and bases of rent reviews. The clause inserts a new basis on which rent can be calculated (base rent plus a percentage of turnover). The Explanatory Notes state that “[t]his will allow more flexibility for both lessors and lessees in an expanding market to negotiate favourable conditions for developing retail businesses.”¹⁸

Clause 15 also inserts **proposed new s 27(8)** which enables lessors and major lessees¹⁹, in certain circumstances, to negotiate a rent review mechanism which is different to those set out in the Act.

¹⁶ A lessor is a person who grants a lease of a retail shop.

¹⁷ A lessee is a person to whom a lease of a retail shop is granted.

¹⁸ Retail Shop Leases Amendment Bill, Explanatory Notes, p 9.

¹⁹ Major lessees are lessees of five or more retail shops in Australia.

The Bill inserts a new subdivision on current market rent. **Proposed new s 27A** allows a lessee to ask for the current market rent to be determined in a specified period prior to the option expiry day²⁰ if the lease provides for an option on the lessee's part to renew or extend the lease at the current market rent. The Explanatory Notes state that '*[t]his will allow a lessee to make an informed decision and assessment regarding the option.*'²¹

If the lessor and lessee cannot agree on the market rent, section 28 of the Act requires the market rent to be determined by a specialist retail valuer.²² Section 29(c)(i) requires the specialist retail valuer to have regard to submissions from the lessor and lessee about the market rent of the shop. **Proposed new s 28A** sets out the conditions upon which a lessor and lessee may make these submissions. The reason given in the Explanatory Notes for this new provision is to make the process '*more transparent and equitable.*'²³

3.1.3 Sinking fund

Clause 23 expands section 40, which deals with sinking funds for major maintenance and repairs of buildings, plant and equipment, to include all retail premises. The section currently applies only to lessees of retail shops in retail shopping centres. The provision limits the amount that lessors can require in maintenance amounts and specifies conditions for the management of the sinking funds for major maintenance or repairs.

3.1.4 Compensation

Clause 24 amends section 42 so that a lessee who is in occupation of a shop after the expiry of a lease while negotiating a new lease is able to access the Act's compensation provisions. This will enable a lessee to claim reasonable compensation from the lessor for loss or damage the lessee has suffered as a result of certain actions or failures to act by the lessor as set out in section 43 of the Act.

²⁰ The option expiry day is the last day on which the option to renew or extend the lease may, under the lease, be exercised.

²¹ Retail Shop Leases Amendment Bill, Explanatory Notes, p 9.

²² A specialist retail valuer is defined in section 5 of the Act to be "a person whose name is recorded on the list of specialist retail valuers kept under the *Valuers Registration Act 1992*" (Qld). Under section 42B of the *Valuers Registration Act 1992* (Qld), a registered valuer with sufficient experience in retail valuation may be recorded in the list of specialist retail valuers.

²³ Retail Shop Leases Amendment Bill, Explanatory Notes, p 10.

The circumstances in which a lessor may be liable to pay reasonable compensation to a lessee include if the lessor substantially restricts access to the leased shop or significantly disrupts the lessee's trading or fails to rectify any breakdown of plant or equipment that is under the lessor's care.

Aligned with the change made by **clause 24** is the amendment to the definition of "lessee" in section 5 made by **clause 4**. The Explanatory Notes state that the definition of "lessee" is amended to include lessees who are holding over under a lease,²⁴ sublessees²⁵ and franchisees²⁶ to enable them to access the compensation provisions of the Act.²⁷

3.1.5 Lease renewal

The Bill shifts the onus from the lessee to the lessor with respect to notification regarding renewing a lease: **proposed new ss 46 and 46AA**. If there is no option or agreement for the lessee to renew or extend the lease, a lessor must, within a specified period, offer a lessee a renewal or extension of the lease, or tell the lessee that they do not intend offering the lessee a renewal or extension. Under current section 46, the onus is on the lessee to ask the lessor to renew the existing lease.

3.1.6 Relocating lessee's business

The Bill inserts a number of new provisions relating to the relocation of a lessee's business due to the lessor refurbishing, redeveloping or extending the building in which the leased shop is situated: **proposed new ss 46C – 46G**. The lessor's notification requirements are laid down in **proposed new s 46D**. Under **proposed new s 46E**, the lessee has the right to terminate the lease. If the lessee does not terminate the lease, the lessee is deemed to have accepted the lessor's offer of a lease of an alternative retail shop mentioned in the relocation notice, or an alternative retail shop agreed between the lessor and lessee. The lessee is entitled to be paid the reasonable costs of relocation by the lessor: **proposed new s 46G**.

²⁴ "Holding over under a lease" means remaining in possession of the retail shop after the tenancy has terminated.

²⁵ A sublessee is a person to whom a lease is granted by one who is himself or herself a lessee of the property.

²⁶ A franchisee is a person to whom permission is granted by a retailer to sell his or her products.

²⁷ Retail Shop Leases Amendment Bill, Explanatory Notes, p 4.

3.1.7 Demolishing building in which lessee's business is situated

Proposed new ss 46H – 46K cover those situations in which a leased shop is in a building which is to be demolished. A lessor must give a lessee at least six month's notice before the day on which the lease is to terminate (termination day): **proposed new s 46I**. The lessee may terminate the lease earlier than the termination day: **proposed new s 46J**.

Proposed new s 46K states that the lessor must pay reasonable compensation to the lessee for loss or damage suffered by the lessee because of the early termination of the lease if the demolition is not carried out within a practicable time after the termination day. The lessor will be liable for the fit out of the shop which was not provided by the lessor. However, a lessor will not be required to pay compensation to a lessee if, at the time of the lessor's termination notice, there was a genuine proposal to demolish the building within a practicable time after the termination day.

3.2 RETAIL TENANCY DISPUTE RESOLUTION

3.2.1 Time periods

The Bill amends a number of timeframes relating to the retail tenancy dispute resolution process. Amendments have been made to the time periods specified in sections 56, 63, 64, 65 and 66A.

Clause 31 amends section 56 to allow the Chief Executive to issue mediation notices '*as soon as practicable*'. Under the current Act, the Chief Executive is required to do this within seven days. The Explanatory Notes comment that this is not possible during Christmas and New Year periods.²⁸

In sections 63 and 64, **clause 32** extends the time period for lodgement of a notice of dispute at the end of the lease, from four months to one year. The Explanatory Notes state:

*'This has been extended to allow for all outstanding issues between lessee and lessor to be resolved and to provide a more reasonable period of time prior to lodging a notice of dispute.'*²⁹

²⁸ Retail Shop Leases Amendment Bill, Explanatory Notes, p 14.

²⁹ Retail Shop Leases Amendment Bill, Explanatory Notes, p 14.

Clauses 33 and 34 amend sections 65 and 66A by replacing ‘14 days’ with ‘as soon as practicable’. The Explanatory Notes state that this amendment is proposed for section 65 because it was considered that 14 days was insufficient time for parties to request an adjournment to consider informal negotiations or settlement offers.³⁰ The reason given in the Explanatory Notes for the amendment to section 66A is that it is ‘not efficient or effective’ to appoint members of a Retail Shop Lease Tribunal (the tribunal) to a particular dispute some six to ten weeks prior to the hearing. The proposed changes ‘will allow the chief executive to appoint the additional tribunal members in a timely manner with adequate notice.’³¹

3.2.2 Inclusion of parties

Current section 70A provides that the tribunal may order that a person be included as a party to the dispute, if asked to by a party to the retail tenancy dispute and the person’s presence is necessary. **Proposed new s 70A** allows the tribunal to include a person as a party to the dispute in certain circumstances either on the application of a party or on the tribunal’s own initiative.

3.2.3 Representation

Clause 36 omits section 71(2) which provides that a party to the dispute may not be represented at the tribunal’s hearing by a lawyer or professional advocate except in specified circumstances. **Proposed amended s 71** allows a party to be represented at the hearing after giving written notice and obtaining the tribunal’s permission.

3.2.4 Conciliation

Proposed new s 82A requires the tribunal to try to bring the parties to settle the matter prior to making an order on the dispute. If the parties reach a mediation agreement, the tribunal must, if possible, make an order giving effect to the agreement.

³⁰ Retail Shop Leases Amendment Bill, Explanatory Notes, p 15.

³¹ Retail Shop Leases Amendment Bill, Explanatory Notes, p 15.

3.2.5 Errors

Proposed new s 88A allows the tribunal to correct certain errors it has made.

3.2.6 Costs

The Bill proposes to insert a new provision dealing with the payment of costs if an offer to settle is rejected: **proposed new s 91A**. The tribunal may award costs to a party who makes a formal offer to settle the issues in dispute but whose offer is not accepted by the other party, and the tribunal's decision in the matter is not more favourable to the other party than the offer.

3.2.7 Composition of Tribunal

The Bill proposes to allow the tribunal to consist of only one person in disputes where the amount in dispute is currently less than \$7,500: **clause 42**.

3.2.8 Jurisdiction

The Bill inserts **proposed new s 109(4)** so that the tribunal will be able to determine disputes about rent arrears payable under the lease at the same time it hears a claim for compensation lodged by the lessee. As the Act currently stands, the tribunal is unable to hear these matters³² and, as such, they must be dealt with in another jurisdiction, such as in the Magistrates Court.

3.3 OTHER AMENDMENTS

3.3.1 Disclosure Provisions

The Bill strengthens the disclosure obligations for parties to a lease.

Clause 9 amends a lessor's disclosure obligations. Under **proposed new s 22**, a lessor is required to provide a prospective lessee with a copy of the lease and a disclosure statement at least seven days before entry into the lease. The proposed new provision extends the time available to a lessee to terminate the lease and seek compensation from the lessor, from two months (under the current Act) to six

³² Section 109(1)(b)(i) of the Act.

months, if the lessor fails to meet mandatory disclosure requirements. The lessee will not, however, be able to terminate the lease on the basis that the disclosure statement is defective if the lessor acted honestly and reasonably and the lessee has not been disadvantaged.

Major lessees, that is those leasing five or more retail shops in Australia, are able to waive their entitlement to receive a disclosure notice at least seven days before they enter into a retail shop lease: **proposed new s 22(6)**. The Explanatory Notes explain that ‘[t]his will allow an experienced lessee to act expeditiously to acquire a competitive retail site without delay.’³³

Clause 10 of the Bill makes it mandatory for a prospective tenant to provide a lessor with a disclosure statement. Under current section 22A, a lessee is required to provide a disclosure statement only in certain circumstances.

The disclosure obligations of assignors³⁴, prospective assignees³⁵ and lessors are amended by **clauses 11** and **12** in a similar manner to those for lessors and lessees.

Clause 26 inserts **proposed new s 43A** which enables a lessor to obtain reasonable compensation from a lessee, assignor or assignee who makes a false or misleading statement in a disclosure statement.

3.3.2 Lessee not liable for assignee’s default

Proposed new s 50A states that, provided disclosure requirements are met, a lessee who assigns a lease is not liable if the assignee defaults under the lease.

3.3.3 Definitions

The Bill amends a number of definitions in the Act. Two examples are the amendments to the definitions of “retail shopping centre” and “retail shop lease”.

The Explanatory Notes explain that **clause 5** amends the definition of “retail shopping centre” in section 8 because the ‘existing definition distinguishes between floor levels within a retail shopping centre and causes difficulties in issuing leases which need to reflect constantly changing patterns of usage.’³⁶

³³ Retail Shop Leases Amendment Bill, Explanatory Notes, p 7.

³⁴ An assignor is a person who transfers their retail shop lease to another person.

³⁵ An assignee is a person to whom a retail shop lease is transferred.

³⁶ Retail Shop Leases Amendment Bill, Explanatory Notes, p 6.

The definition of “retail shop lease” in section 5, amended by **clause 4**, will exclude non-retail activities located within the common areas of a retail shopping centre. This means that amenities such as internet terminals, ATMs and vending machines, as well as storage areas and parking facilities³⁷ will be excluded from the operation of the Act.

3.3.4 Consistency

A number of minor amendments are made by the Bill to ensure consistency with other jurisdictions. Current section 37(5), for example, is amended by **clause 22** to refer to a “registered auditor” which is in accordance with the *Corporations Act 2001 (Cth)*.³⁸

3.3.5 Review of the Act

Clause 44 proposes to extend the period between reviews of the Act from five to seven years. The reason given for this in the Explanatory Notes is that the amendment ‘*is a more practical timeframe to allow for the implementation of the amendments in the marketplace ensuring the provisions of the amending Act have been adopted in retail shop leases.*’³⁹

3.3.6 Application of the proposed changes

Clause 45 inserts **proposed new s 129** which provides that the Bill’s provisions relating to mandatory minimum standards for retail shop leases will only affect leases entered after the Bill is enacted. **Proposed new s 129** also determines that the new dispute resolution provisions will only apply to retail tenancy disputes lodged after the commencement of the proposed Act.

4 OTHER JURISDICTIONS

Each of the Australian jurisdictions has enacted retail tenancy legislation.⁴⁰ Two of these jurisdictions – Victoria and New South Wales – are discussed briefly below.

³⁷ Retail Shop Leases Amendment Bill, Explanatory Notes, p 5.

³⁸ Retail Shop Leases Amendment Bill, Explanatory Notes, p 11.

³⁹ Retail Shop Leases Amendment Bill, Explanatory Notes, p 18.

⁴⁰ A list of the legislation is in the Appendix – Australian Retail Tenancy Legislation.

4.1 VICTORIA

The Victorian Government passed its *Retail Leases Act 2003* (Vic) following a comprehensive review of its retail tenancy legislation. In the Second Reading Speech for the Retail Leases Bill, the Hon John Brumby, the Victorian Treasurer, stated that the aim of the legislation was to:⁴¹

- better protect small and medium sized retail tenants;
- require more effective and timely disclosure statements;
- provide reasonable security of tenure; and
- introduce a low-cost and responsive dispute resolution mechanism.

The Victorian Government established the Small Business Commissioner⁴² to arrange mediation in retail disputes, undertake education campaigns and, if necessary, run test cases.⁴³

4.2 NEW SOUTH WALES

The *Retail Leases Act 1994* (NSW) (the NSW Act) sets out the obligations of lessors and lessees with respect to the leasing of certain retail shops. The NSW Act was introduced to lower the number of retail tenancy disputes and provide cost effective and timely dispute resolution processes.⁴⁴

While there are many similarities between the NSW Act and both the current and proposed Queensland legislation, differences also abound. The NSW Act, for example, contains similar provisions to those proposed in the Bill relating to disclosure statements to be provided by lessors and prospective lessees. However, it also provides for a financial penalty if a lessor or lessee fails to comply with the disclosure obligations. The NSW Act also differs from the proposed Queensland legislation in that it does not differentiate between major lessees and other lessees.

⁴¹ Hon John Brumby, Treasurer, Retail Leases Bill (Vic), Second Reading Speech, *Victorian Parliamentary Debates*, 27 February 2003, pp 230-233, pp 230-231.

⁴² Under the *Small Business Commissioner Act 2003* (Vic).

⁴³ Hon John Brumby, Treasurer, Retail Leases Bill (Vic), Second Reading Speech, *Victorian Parliamentary Debates*, 27 February 2003, pp 230-233, p 231.

⁴⁴ Hon Raymond Chappell, Minister for Small Business and Minister for Regional Development, Retail Leases Bill 1994 (NSW), Second Reading Speech, *New South Wales Parliamentary Debates*, pp 1547-1548.

APPENDIX – AUSTRALIAN RETAIL TENANCY LEGISLATION

Business Tenancies (Fair Dealings) Act 2003 (NT)

Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)

Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas)

Leases (Commercial and Retail) Act 2001 (ACT)

Retail and Commercial Leases Act 1995 (SA)

Retail Leases Act 1994 (NSW)

Retail Leases Act 2003 (Vic)

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