Retail Leases
in Tasmania

Discussion Paper

October 2019 Version 1.0

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# Introduction

In Tasmania, lease arrangements between landlords and smaller retailers must currently comply with the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998, which are due to expire in 2020.

This Code of Practice is considered to be out of date and inadequate for the complexity of modern markets and leasing arrangements.

The Tasmanian Government is committed to ensuring that public consultation processes are open and transparent and allow everyone to have their say.

This is an opportunity for broad consultation on retail leases. We are seeking input from anyone with an interest in this area, with a view to developing a new code or legislation that is fit for purpose and will meet the needs of landlords and retail tenants in today’s market and beyond.

## Scope of discussion paper

Other States and Territories have updated their retail lease legislation in response to a major review conducted in 2008 by the Productivity Commission, which resulted in the Report “Retail Tenancy Leases in Australia”.

This Report identified a number of areas where retail lease legislation could be improved.

Recommendations of recent reviews are included here as a starting point for discussion, but you are encouraged to identify other areas that should be included.

## How to make a submission

Please ensure we receive all written submissions on the Discussion Paper by close of business on Monday 11th November 2019.

You may choose to address some or all of the questions listed, or provide other information based on your own experience of the retail lease market.

You can make your submission by:

* Sending it by email to haveyoursay@justice.tas.gov.au or
* mail your submission to:

Retail Leases Review

Consumer, Building and Occupational Services

PO Box 54

ROSNY PARK TAS 7018

## Publishing submissions

Submissions will be treated as public information and will be published on our website at <https://www.justice.tas.gov.au/community-consultation> unless you ask us not to publish.

We will include your name or organisation but no other personal information when publishing.

Submissions will be published once all submissions have been considered and the Government forms a policy position on preferred reform measures.

For further information, please contact: cbos.info@justice.tas.gov.au or read the [Tasmanian Government Public Submissions Policy](http://www.dpac.tas.gov.au/divisions/office_of_the_secretary/public_submissions_policy).

# Key areas for discussion

We’ve identified a number of areas relating to retail leases where we would like your input:

* There are inconsistencies in the types of retail businesses to which the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (“the Code”) applies;
* Rent review mechanisms are unwieldly and may hamper the parties’ negotiations. For example:
* Tenants may prevent a rent review if they refuse to accept a valuer’s decision;
* Landlords may inadvertently lose the ability to review rents if they fail to provide rent estimates to tenants (a clause that is unique to Tasmania);
* No “Monitoring Committee” has been established to provide stakeholder feedback on operation of the Code, even though this is required under the current Code;
* There is a lack of alternative dispute resolution processes, apart from the Director reviewing simple enquiries and giving non-binding advice;
* The Director has no powers to make enforceable undertakings for breaches of the Code;
* There is no penalty for failure to provide disclosure statements;
* Landlords can’t request security deposits greater than three months’ rent equivalent;
* The Fair Trading Act 1990 under which the Code was originally made, has since been repealed, so we need to ensure the new legislation either stands alone, or refers to another Act.

We encourage you to include other topics based on your experience of retail lease arrangements.

## How do we define a “retail premises”?

The definition of “retail premises” differs between jurisdictions, and some of the types of retail premises listed in the Code no longer exist, whereas others have been introduced, so this is a good opportunity to ensure the definition we use is appropriate for the current and future market.

Are there any types of retail business activities which should be **excluded** from the Act? For example:

* “retail provision of services” such as a tax agent, conveyancer, lawyer?
* retail businesses within other premises, such as in a sports arena, cinema, bowling alley?
* Should temporary, but regularly held market stalls be included? (Salamanca Market type arrangements);
* Should any residential parts within commercial buildings be excluded if they are not directly used for a retail purpose?

The current Code only applies to retail businesses of less than 1000m2 to capture smaller retail outlets. Leases for larger retailers such as Kmart, Coles and Woolworths are managed under commercial contracts.

Question : Which retail premises should the new Act apply to? Are there any types of retail premises that should be excluded?

## Entering a lease

### What documents should be supplied when entering a lease?

In other states, a copy of the proposed lease is provided as soon as negotiations begin.

A disclosure statement, which includes details such as expected costs and expenses for tenants, and how the rent is calculated and reviewed, is also a common requirement in other States and Territories.

* The items to be disclosed may be determined by the Director. This provides flexibility to react to changing priorities without needing to amend the legislation (a process that can take up to 18 months).
* A plain English Retail Leases Guide or Fact Sheet for tenants may assist prospective tenants to understand their rights and obligations.

Documents could be mandatory, such that a failure to supply them in the proscribed timeframe may allow the tenant to terminate the lease without financial penalty.

Question : Which documents should be supplied, and should they be mandatory? At what stage in the negotiations should these documents be provided?

### What should a lease contain?

Best practice suggests that leases should be written in Plain English and contain a cooling off period.

* The lease should be signed by both parties and any alterations initialled by both parties.
* NSW has a mandatory lease contract that must be used, but most other states allow for a variety of contract formats with mandatory clauses that the Director determines.
* Many contracts have a “cooling off” period. Is this appropriate for a Retail Lease, and if so, what would be a reasonable period for a prospective tenant to walk away without financial penalty? How should this be managed? Should the landlord be able to recoup any reasonably incurred costs?
* Currently the Code only applies to leases of five or more years. Does this provide sufficient protection for small retailers? Should leases made for a shorter period also be covered by the legislation?

Question : What should a lease contain?

Question : Should there be any restrictions on the length of the lease?

### Should a lease be registered?

The *Land Titles Act 1980* sets up a process for registering leases in a central registry where the lease arrangement is discoverable by search. This means that if the property is sold, the new owner is deemed to have known about the lease and is obliged to honour its terms.

Only leases, which are of three years or more, may be registered. Registration of leases is not currently mandatory but can be negotiated between tenant and landlord, however if the landlord does not agree, the tenant can still unilaterally take out a caveat on a title claiming a leasehold interest.

Question : Is there a benefit in requiring a lease to be registered? When should this occur?

### Costs of entering a lease and premises fit-out

In interstate retail lease legislation, there are two main options regarding who pays the costs of entering a lease:

1. Each party pays their own costs in relation to the lease preparation; or
2. The landlord is fully responsible for the lease preparation costs; but is able to recover from the tenant reasonable costs incurred when entering the lease (or else may only recover specific costs, such as where the consent of a Government agency was required for operation of the lease).

Costs may include legal costs, discharge of mortgages and stamp duty costs.

There is also the question of who should pay for fit-outs, particularly if there is going to be a change of use of the premises – for example to change from general retail to food service.

Landlords are not allowed to request “key money” in any Australian legislation, including our current Code. This money is sometimes described as a fee for ‘collecting the keys’, 'signing the contract' or 'renewing the lease’, which is out of proportion with the actual costs of performing these activities.

Landlords are also prohibited from asking for key money or expenses in connection with a renewal or extension of a lease, unless the amendments to the lease have been requested by the tenant and may result in increased lease preparation expenses.

The Code provides that a security deposit is limited to the equivalent of three months’ rent. The 2002 review of the Code questioned whether this area needed to be regulated at all or whether it should be left to the parties to negotiate.

However most other jurisdictions now have in place detailed provisions dealing with the operation of these guarantees or similar undertakings.

Question : Who should pay the cost of establishing a new lease and any necessary changes to the premises?

Question : Should there be any restrictions on monies paid up front in the form of a security guarantee, bond, deposit or key money?

## Rent

Landlords and tenants need to agree on the amount of rent, when it should be paid, including whether the first payment is due on signing of the lease, or after any fit-outs have been completed.

There should be clear provisions for how the rent is calculated, and reviewed.

These may include:

* If rent may be adjusted during the term of a lease;
* Timing of reviews of rent increases;
* How rent reviews may be conducted, how often, and when during the lease; for example, not during the first 12 months and then not more than once every 12 months;
* Process for handling disputes about rent increases – can a valuer (expert) be engaged to determine an appropriate amount;
* Confidentiality of the information that is supplied to a valuer when deciding on the rent review;
* Tasmania is the only state where the tenant has the right to know the market rent before exercising an option. This only affects leases where the starting rent is to be the “current market value rent”.

Question : Are there changes you would like to see regarding arrangements for rent or does the current system work?

## Outgoings

Outgoings are certain expenses of the landlord, which the tenant has agreed to pay under the lease.

A lease should clearly define outgoings, what they cover and specify whether GST and land tax are included.

The tenant should not be liable to pay any amount unless the item was disclosed at the time of lease negotiation.

The following outgoings are usually not recoverable from a tenant, even if “disclosed” before a lease is signed:

* capital expenditure;
* contribution to a fund which the landlord uses for major repairs and maintenance;
* depreciation;
* land tax;
* interest or charges etc. on landlord's borrowings;
* rent etc. associated with other land;
* insurance premiums or excess on a landlord’s claim;
* the landlord’s contributions to merchant’s associations or shopping centre promotional funds.

Question : How should outgoings and the responsibilities of each party in relation to outgoings be managed?

## Interference with retail tenancy during the lease

A general principle of retail leases legislation is that a tenant should be able to have “quiet enjoyment” of the leased premises without interference from the landlord. A landlord is liable to pay the tenant reasonable compensation for loss or damage suffered by the tenant if the landlord’s conduct (for an act, or an omission) adversely affects the tenant’s business.

Disturbances can cover issues such as works to and around premises.

The current Code does not include provisions regarding how such disturbances should be managed, including notification, offer of alternative premises and relocation costs.

Question : What provisions should the Act include to clarify the rights and responsibilities of tenants and landlords regarding disturbances?

## Subletting or transferring a lease

The current Code does not clearly specify the obligations of tenants and landlords when sub leasing, assigning (transferring) a lease to someone else or seeking to terminate a lease.

Generally, interstate retail lease legislation restricts a landlord’s ability to refuse consent for a lease to be assigned or sublet. Key criteria that may justify a refusal are specified and an “assignor’s disclosure state” which gives details of the proposed arrangement is included.

Additions to a new Tasmanian Retail Leases Act may include similar provisions, as well as procedures and time frames for making assignment or sub-leasing arrangements.

* Does the Act need to ensure that the same protections apply to the new tenant?
* Alternatively, when a tenant chooses to “assign” their lease to someone else, should this be taken to be a termination of the lease?

The current Code prohibits a provision in a lease that requires a tenant to indemnify a property owner against any action, liability, penalty, claim or demand. This seems to be unique to Tasmania.

* Should the landlord be able to claim reasonable legal costs if a tenant chooses to assign a lease to a new party?

Question : How should sub-leasing and assignment of a lease be managed?

## Renewing or ending a lease

At the end of a lease a landlord may choose either to renew the lease or let the premises to a new tenant. They may choose not to let the property again.

However, before that time, the landlord should give the tenant notice stating whether they plan to offer them a renewal of the lease. The current Code requires the landlord to give notice in writing not less than 3 months before the expiry of a lease. Should this be not less than six months and up to 12 months, before expiry?

* What is a reasonable notice period to a tenant if the landlord chooses not to renew the lease?
* If a lease is to be renewed, should a formal disclosure statement be provided again?
* Should the renewal include a statement of the proposed rent, or should the current rent continue until it is reassessed?

Question : What processes should apply to renewing or ending a lease?

## Special provisions for shopping centres

It is common for legislation governing retail leases to contain special provisions for retail premises located in retail shopping centres, for example Eastlands or Northgate, where access to premises may be determined by the landlord.

For example, there may be restrictions on trading hours, specified core trading hours, centre trading hours and special trading hours (for example at Christmas).

The Act may make provision for changing these hours by specifying the level of agreement required from tenants, for example requiring 75% of tenants to agree to a proposed change.

Disclosure statements for leases in shopping centres may also include information about:

* the annual sales of the centre;
* turnover for specialty shops per square metre, using at least three categories (food, non-food and services);
* centre traffic count;
* details of specific fit-out construction standards;
* details of when the leases of major tenants end;
* permitted uses of the prospective premises.
* There may also be special provisions relating to advertising and promotions.

The current Code prohibits a landlord from using inadequate sales as a criterion for terminating a lease.

Question : Which additional provisions might be required for retail premises in shopping centres?

## Dealing with complaints and disputes

The current Code prohibits conduct that is “harsh, unjust or unconscionable” but does not provide adequate measures for seeking redress.

The 2002 Review of the Code found that dispute resolution mechanisms were inadequate as they mainly relied on parties attempting to resolve their own dispute. Alternatively, they could request the Director to investigate a matter and negotiate a resolution, but lack of necessary expertise usually means this function is outsourced to a professional mediator approved by the Director.

Best practice dispute resolution mechanisms involve low cost, accessible informal mediation, followed by a formal hearing by a disputes body, Court or private adjudicating body such as an Authorised Nominating Authority. This approach has been adopted elsewhere in other Tasmanian legislation and may be appropriate here.

The Act would need to define the jurisdiction of a disputes resolution body, and the types of relief, remedies or orders it could make and enforce.

Question : How should unconscionable conduct be defined and dealt with under the Act?

Question : What model of dispute resolution would work best for retail leases?

## Transition to new regulation

When new legislation is introduced, we need to consider how this will apply to existing leasing arrangements.

* For example, how long should landlords have to comply with the new legislation?
* Should all leases comply from the time the new Act comes into force, or should it only apply to new leases?
* Should existing leases be updated to comply when they come up for renewal or termination?

This would provide a five-year transition and spread out any administrative overhead.

Should dispute resolution provisions be available to all parties, regardless of when the lease was signed?

Question : How should the new Act be applied to ensure all leases comply?

## Powers of the Director of Consumer Affairs and Fair Trading

In order to make the new Act flexible enough to deal with changing circumstances, it is common practice to give the Director of Consumer Affairs and Fair Trading the power to issue legally binding determinations on matters such as:

* Which documents must be provided during lease negotiations;
* What a lease must contain;
* The form and content of a Disclosure Statement;

Such powers are usually limited by requiring consultation with appropriate industry bodies and other stakeholders before any changes are made.

This allows the legal framework to be adjusted if circumstances change, without requiring a change to the Act, which can take up to 18 months or longer.

Question : Which areas of retail lease arrangements would be appropriate for the Director of Consumer Affairs and Fair Trading to manage through legally binding determinations?

## Other considerations

Some interstate legislation prohibits lease provisions in these areas:

* Geographical restrictions which prevent or restrict the tenant from carrying on business outside the retail shopping centre either during their lease or after its expiry;
* Restrictions on who the tenant employs or engages;
* Restrictions on joining a tenant representative body.

Question 18: Should we include such prohibitions in Tasmanian legislation?

# What happens next?

Following the release of this Discussion Paper, submissions will be received up until Monday the 11th of November 2019.

We will use your input to develop a draft Retail Lease Bill which we will make available for comment.

This will allow us to finalise the Bill for introduction into Tasmanian Parliament.

If the Bill is passed by Parliament, a date will be set for commencement of the new Retail Leases Act, noting the new legislation should be in place before the Code expires.

Implementation will include drafting any required Regulations and Determinations, and conducting a retail industry awareness and education campaign.



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