



Restaurant
& Catering

SAVOUR
AUSTRALIA



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R&CA appreciates the opportunity to provide a submission to the Retail Leases in Tasmania Discussion Paper. As the only national industry association acting on behalf of the café, restaurant and catering sector, including 800 individual businesses in Tasmania, R&CA supports the continued operation of the state's retail leasing legislation but believes steps can be taken to improve the operation of this legislation to ensure it better meets the needs of small businesses in the hospitality sector. As a key industry stakeholder, R&CA has been actively involved in government consultations regarding the review of retail leases in NSW, QLD, Victoria and South Australia.

Restaurants, cafes and hospitality providers are a critical component of the retail and tourism offering in Tasmania. Restaurants complement the retail offering in shopping precincts, encouraging greater patronage and expenditure, while activating leisure destinations. Eat out and dine at restaurant and shopping for pleasure are the two most popular activities for international and domestic visitors to Tasmania.

A large proportion of restaurant and café owners lease their place of business, making the Tasmanian Retail Lease Review of critical importance to the sector. R&CA's 2019 Benchmarking Report found that 83.1 per cent of restaurants lease the premises in which they operate, a nearly 20 per cent increase on 2017 figures. The same survey found that 56.1 per cent are located in suburban areas, and 17.7 per cent in a capital city or CBD area.

Rent costs associated with leasing can form a significant component of restaurant expenditure. R&CA's 2019 Benchmarking Report found that rent can account for on average 9.0 per cent of business costs, a marked increase from 7.5 per cent in 2015-16. Total occupancy costs have reached 16 per cent in 2019, up from a low of 12.8 per cent in 2014-15.

Ensuring retail lease legislation provides a fair and equitable environment for restaurants to operate is key to the sustainability of the sector. Of particular interest to the sector is ensuring information asymmetry does not reduce the bargaining power of restaurant operators. R&CA would submit that due to the impending expiration of the regulation and the repeal of the Fair Trading Act 1990 where the code was originally made, a standalone retail leasing act is required in Tasmania to better regulate the retail leasing sector and bring Tasmania into line with other state jurisdictions.

R&CA has listed key concerns of our industry below for consideration as part of the review.



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INFORMATION ASYMMETRY – HOW TO KNOW IF IT IS A GOOD DEAL & TURNOVER DATA

R&CA believes the confidentiality of financial arrangements between two parties is not as important as the provision of clear and easy to understand industry information. The inability to access appropriate data places restaurant operators at a disadvantage when determining the suitability of a lease arrangement compared to other offers made to different tenants. R&CA supports the findings of the PC Report 2008 and believes a register summarising the financial arrangements of a lease(s) should be made publicly available (and in a downloadable format).

R&CA supports the recording side deals in a summary sheet. This process ensures consistency of information being communicated to lessees.

In relation to turnover data, this is an area of considerable contention for restaurant owners. The ability of landlords to request turnover data and make decisions based on this information results in inequity for operators in the decision-making process. There is no transparency in how this information is used across multiple tenant arrangements, particularly in shopping centres.

Rarely do landlords grant struggling tenants rent concessions following a review of turnover data, yet rents are revised upwards based on favourable earnings recorded.

Furthermore, the disclosure of turnover data does not allow operators to balance leasing costs over the life of a lease, which is often necessary given the cyclical nature of restaurant operations. R&CA advocates that the collection of turnover data should not be required or used in the determination of lease arrangements.

OUTGOINGS

R&CA supports greater certainty in outgoings, including management fees that are recovered from tenants, and new reporting obligations to ensure a landlord who collects outgoings is more streamlined. This would mean that the tenant gets important information, yet unnecessary costs and any excessive reporting activities are removed. R&CA also supports full disclosure of all outgoings including management fees to provide greater clarity to tenants such as implementations made in Victoria with regards to the disclosure of fees.

R&CA believes that the disclosure of outgoings does not necessarily need to be reportable, but there is a need for these outgoings to be disclosed prior to any agreements being entered into.

In relation to hidden fees and levies, R&CA believes that there may be some unnecessary red tape in the requirement to have detailed marketing plans. R&CA believes further consideration could be given to the inclusion of marketing levies as part of rent. All levies should be disclosed to tenants prior to the beginning of a lease, including how certain levies are to be calculated. While unforeseen

circumstances may arise which require attention, non-disclosure means businesses cannot appropriately budget their outgoings. If levies are not disclosed, the tenant should not be expected to pay.

Fidelity of Lease

R&CA members often perceive a significant imbalance in the bargaining power between landlord and tenant. The imbalance often results from the additional investment restaurant owners make above and beyond rent paid, including funds contributed to fit out, marketing and the generation of goodwill. This means that at the time of renegotiation, it can sometimes be more critical for the operator to re-secure the lease than the landlord.

Operators require certainty of tenure in order to operate their businesses effectively. This, coupled with the capacity for landlords to increase rent based on turnover data can create considerable uncertainty as to a restaurant's operating environment. R&CA would support methods to improve the ability of tenants to negotiate a new lease at the end of term, namely last right of refusal.

R&CA supports the closure of loop holes in the Act that lead to inequities between parties to a lease. However, R&CA would caution against reducing more prescriptive requirements of the Act that clearly articulate the responsibilities of each party to a lease and provide certainty to businesses on their obligations under the Act.

In relation to sub-tenancy arrangements, R&CA believes sub-tenants should have the same rights as tenants, particularly where they are able to demonstrate the solvency of their operation. R&CA would support the registration of a sublease with the same terms and protections afforded a head lease, providing greater certainty to franchisees.

R&CA believe that owners should be jointly and severally liable for disruption that occurs to a tenant as a result of the Owner's Corporation's inability to rectify or maintain common property. A tenant should have the right to terminate their lease without prosecution and claim compensation if the Owner's Corporation fails to maintain or repair common property within a reasonable timeframe.

Remedies to repair damage to a premise could be further strengthened in the Act, including providing a definition of what constitutes 'damage' to a property (either by neglect or an event), as well as providing specific timeframes as to what constitutes a "reasonable time" for a landlord to rectify and respond to damage notices by tenants.

STREAMLINING/SIMPLIFICATION OF ACT

R&CA would caution against harmonizing Disclosure Statements simply to mirror the work of other states. However, where a need has been identified, there is the potential to streamline Disclosure

Statements to reduce red tape and make it simpler for both parties to understand their obligations under the agreement.

All businesses that could be considered 'retail' experiences in an office tower should be included in the Act. In particular, R&CA is seeking clarification over the coverage provided to coffee shops in office tower foyers, for example.

R&CA believes the Act should clarify whether mortgagee consent fees can be passed on to a tenant – these are a cost to the landlord when registering a lease and therefore should not be payable by the tenant.

In most leasing arrangements, the balance of bargaining power lies in the hands of the landlord. Introducing a test of good faith would require landlords to act in a more sympathetic fashion to tenants and operators. R&CA believes a duty to act in good faith could encourage fairer and more equitable lease arrangements between two parties

In relation to bank guarantees, The Act should be explicit about when bank guarantees can be drawn down, including the requirements for informing tenants when this has occurred.

Returning a bank guarantee to a lessee within 30 days would be considered a reasonable timeframe to return funds.

Finally, R&CA would strongly caution against provisions relating to possible termination of leases for inadequate sales, in fact supporting proposal to prohibit this activity. R&CA believes the decision to terminate a lease due to inadequate sales should be determined between landlord and tenant, and not prescribed in the Act. As mentioned previously, the cyclical nature of the sector means a majority of turnover can be generated in a particular month or quarter (summer holidays for example). The inability to average sales and rent contributions over the longer term of the lease does not reflect the true nature of the sector, nor recognise when sales may peak and trough.

In addition, some members have reported the inclusion of clauses where the current tenant must demonstrate the solvency of new owners should they decide to sell their business. In particular, clauses requiring the purchaser to have the same restaurant experience and financial capacity equal to the current operator make it onerous for the tenant to on-sell their business. R&CA is seeking consideration of how such clauses could be excluded from leasing arrangements.

Conclusion:

If you wish to discuss R&CAs submission further, do not hesitate to contact Tom Green, Manager – Policy and Government at R&CA by email at tom@R&CA.asn.au.

We thank you again for the opportunity to make this submission.

Regards

A handwritten signature in black ink, appearing to be 'Wes Lambert', with a stylized, cursive script.

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Chief Executive Officer
Restaurant and Catering Australia