Background

1.1 About RTA

The Retail Traders Association of WA (RTA) represents the interests of over 338 retail members throughout Western Australia. The Association's members range from owner operated micro businesses through to the major corporations. In excess of 80% of RTA members are small businesses. The views expressed in this submission are taken from the perspective of the impact of existing retail tenancy legislation on the retail sector as a whole, rather than from one particular segment or size of business.

In many circumstances, RTA has argued against regulations that inhibit a freer market, in such areas as trading hours, industrial relations, liquor and petrol distribution and industry licensing. However in circumstances where there is evidence of market failure and in the absence of a competitive market RTA has argued for the intervention of regulation to support the development of a fair, equitable and competitive market. The retail-leasing environment is characterised, from time-to time, and to varying degrees, as a sector of the economy where anti-competitive conditions may prevail in the absence of regulation.

RTA continually aspires to achieve of a competitive marketplace. RTA strongly believes that where legislation or regulation enhances competition, it should be adopted and where it inhibits competition, it should be abolished.

Retail Tenancy Leases in Western Australia

In Western Australia retail tenancy leases are regulated by the Commercial Tenancy (Retail Shops) Agreements Act 1985 (CTA).

In 2002, concerns were raised by WA small businesses about landlords unfairly using their knowledge and bargaining power against small tenants.

Previous policy response

- In 1997, the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 1997 was introduced into Parliament and proclaimed in June 1998.
- In 2002 and 2003, the WA Government reviewed the CTA with an aim to improving commercial tenancy rights of small business retailers.
- The RTA made a submission to the review in 2002.
- In 2004, following the Review, a Bill implementing the recommendations was introduced into Parliament but was defeated in the Legislative Council.
- In 2005, the Retail Shops and Fair Trading Legislation Amendment Bill 2005 was introduced and contained amendments consistent with the 2004 Bill.
- This Bill was passed and proclaimed in May 2007.
- In July 2007, the Department of Consumer and Employment Protection (DOCEP) will be seeking approval to draft a Bill later this year to implement outstanding recommendations from the 2003 Review. Refer to addendum one for a copy of the letter.

Amendments introduced in 2007

The Retail Shops and Fair Trading Legislation Amendment Act 2005 made consistent amendments to both the Commercial Tenancy (Retail Shops) Agreement Act 1985 (CTA) and Fair Trading Act 1987 which:

- define unconscionable conduct of landlords and tenants, by drawing down on section 51AC of the Trade Practices Act 1974;
- prevent discrimination of businesses who are non members of associations;
- allow relevant parties to refer to industry codes to determine appropriate conduct;
- provide the WA Commercial Tribunal with the power to award appropriate damages and set conditions; and
- require disputes to be reported within six years of an incident.

The RTA considers these amendments a positive step towards improvement, however does not believe the amendments went far enough in addressing the concerns of small tenants.

Recommendations detailed in the RTA's submission to the 2002 review of the CTA are still relevant and are identified within this submission.

RTA would welcome the introduction of national uniform retail tenancy legislation and encourages the Commission to consider recommending the adoption of provisions in the Commercial Tenancy (Retail Shops) Agreement Act 1985 subject to the following recommendations.

Recommendation 1: That the Inquiry recommends national uniform retail tenancy legislation containing provisions in the Commercial Tenancy (Retail Shops) Agreement Act 1985, subject to the following recommendations being actioned.

Inquiry parameters

Competition, regulatory and access constraints

The inquiry will assess the competition, regulatory and access constraints on the economically efficient operation of the market.

Core trading hours

In 2002, RTA recommended that the State Government Review of the CTA examine the provision of core trading hours. Section 12(c)(1) of the CTA voids provisions in a lease which requires a tenant to open at a specified time.

RTA considers that it is no more in the interests of tenants collectively to have shops closed during core trading hours and recommends the legislation provide for an enclosed shopping centre to allow core trading hours to be enforceable under the lease.

Amendments should continue to allow tenants to open during extended trading hours to allow for further deregulation in the Retail Trading Hours Act 1987 as discussed below.

Recommendation 2: That the Inquiry examine the provision of core trading hours when developing National legislation for retail tenancy.

Definition of "retail shop lease"

Section 3(1) of the CTA defines "retail shop lease" to mean retail floor space under 1,000 square metres. The definition of retail shop lease determines whether or not many small businesses have protection under the CTA. The exclusion of retail shops over 1,000 square metres is arbitrary and unbalanced.

Under the definition of "retail shop lease" public companies are also excluded from the CTA. RTA believes that all retailers should be covered by the CTA as there is a single market for retail space particularly within an enclosed shopping centre, to do otherwise undermines the legislation and encourages inequity.

Recommendation 3: That national uniform legislation include retail shop leases over 1,000 square metre and public companies.

Definition of retail shop

Section 3(1) of the CTA defines "retail shop" as any premise:

- situated in a retail shopping centre that is used wholly or predominantly for the carrying on of a business; and
- not situated in a retail shopping centre that is used wholly or predominantly for carrying on a business involving the sale of goods by retail.

New trends in the retail sector have emerged and many businesses have adopted a "mixed use" profile in order to grow and remain competitive. As a consequence the traditional concept of a retail business has become blurred.

Today, a retailer may be involved in the provision of personal and repair services, the hiring of product and equipment as well as the sale of products or any combination thereof. It is essential that the legislation's definition of "retail shop" accurately reflect current industry practice as well as the original intent of Parliament.

Nonetheless coverage of the legislation should not be extended so as to capture the occupants of commercial or light industrial premises, which have a generic rental value not related to their agreed use. Tenants of such premises have a wider choice of alternatives, particularly at lease end, and an ability to relocate business assets and goodwill not available to the overwhelming majority of retail tenants.

Recommendation 4: That national uniform legislation define retail shop to mean:

(a) any premises situated in a retail shopping centre that is used for the carrying on of a business; and

(b) any premises not situated in a retail shopping centre that is used for the carrying on of;

(i) a business involving the sale or hire of goods by retail; or

(ii) a specified business.

Retail Trading Hours

Although not strictly within the terms of reference we believe it is important that the Commission is aware that Western Australia now has the most anti-competitive retail trading hours legislation in Australia. This impacts on all aspects of retail trading in WA.

Western Australia's retail trading hours regulation prescribes when shops can trade and allows some businesses to trade outside of regulated hours as long as they fall within the statutory definition of 'small' or are located in certain areas.

The issue of retail trading hours regulation in the Perth metropolitan area was put to referendum in February 2005. On the issue of allowing shops to trade on Sundays, around 61 per cent of voters supported the case against and on the issue of extending weeknight trading some 58 per cent of voters supported the case against.

The WA Government has argued that this result demonstrates that it is in the public interest to maintain the regulation of trading hours in Western Australia. However, in its 2005 review of government's progress on implementing National Competition Policy (NCP) reforms, the National Competition Council (NCC) rejected the WA Government's justification.

The NCC said that conducting a referendum did not absolve the government from its NCP legislation review obligations and therefore it considered that WA had not met its NCP commitments with regard to the regulation of retail trading hours.

In explaining its assessment, the NCC stated:

> "…independent, transparent and objective reviews provide the best opportunity to assess all costs and benefits of restrictions on competition. The Council is also mindful of COAG's (2000) directive to consider whether review conclusions are within a range of outcomes that could reasonably be reached based on the information available to a properly constituted review process'. Any public interest case for competition restrictions thus needs to be support by relevant evidence and robust analysis. Where a government introduces or retains competition restrictions, and this action was not reasonably drawn from the recommendations of a review, the Council looks for the government to provide a rigorous supporting case, including a demonstration of flaws in the review's analysis and reasoning."[1]

What is most disappointing is that the WA Government has had a number of opportunities to meet its NCP commitments on this issue, with numerous public inquiries into shop trading hours having been conducted over the years. While each of these inquiries recommended deregulation, past and present WA State Governments have consistently failed to implement promised reforms on this issue due to pressure from vested interest groups.

The fact remains that no justifiable market failure supports the regulation of retail trading hours in Western Australia. Retail trading hours regulation:

- impinges on the rights and freedom of citizens as consumers, and imposes significant costs on the economy; and
- distorts the marketplace by unfairly discriminating between businesses and by inhibiting the growth and development of the retail sector in WA.

Recommendation 5: That WA remove restrictions on retail trading hours in the Retail Trading Hours Act 1987.

Information asymmetry

The inquiry will assess the extent of information asymmetry between landlords and retail tenants.

Section 11(2)(a) of the CTA provides for market rent review in a free and open market as if, all the relevant factors, matters, or variables, used in property land valuation practice have been taken into account.

Landlords have an advantage when negotiating rent as they have greater access to tenant information to determine market rent. Generally shopping centres in WA provide the following information to prospective tenants:

- basic statistical information on the demographics of the area;
- traffic flow in the centre and number of parking spaces; and
- aggregate retail turnover for the centre.

The information generally provided to prospective tenants does not provide a complete picture of the tenancy market within a centre. In particular, tenants are not provided with comparative data relating to similar tenants within the centre to accurately determine market rent. Comparative information about similar tenants might include:

- average turnover;
- occupancy costs;
- average rental cost per square metre; and
- other outgoings of retailers.

Without comparative information about similar tenants, prospective tenants accept large financial risk due to the lack of information to accurately negotiate market rent.

A retailer identified that greater transparency of a retail shopping centre's performance would allow tenants to understand the market, benchmark a centre's performance with other centres and to enter into a lease with their eyes open. It would be beneficial for tenants if a landlord were required to release aggregate information about;

- the annual turnover of tenants;
- the number of leases terminated prior to the expiry of the lease term; and
- the number of tenants whose businesses failed.

Valuers may be used to determine market rent however, there is no obligation for landlords to release information to valuers. Landlords are often legally obliged under the lease agreement not to divulge tenant trading activities to a third party. Under section 11(2)(a) of the CTA tenants cannot be prevented from voluntarily disclosing the rent under a lease to third parties.

In 2007, section 12(d)(1) of the CTA was amended to void any provisions in a retail shop lease that prevent or restrict a tenant from forming, joining or taking part in activities of a tenants association, chamber of commerce or similar body. These amendments have allowed tenants a formal avenue to collectively share information.

Recommendation 6: That national uniform legislation include a provision that, on request, a valuer appointed by either party to determine the market rent for a retail shop be supplied with all relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer determine the rent.

Appropriateness and transparency

The inquiry will assess the appropriateness and transparency of factors taken into account in determining retail tenancy rents and of the provisions in leases to determine rights when the lease ends.

Rental review process

WA's economic boom has highlighted an issue for at least some smaller retail tenants that negotiation power is some what weakened when there are negative circumstances impacting retail traffic.

Section 11(2)(b) of the CTA provides that unless specific provision is made in the retail shop lease for the time at which review may be initiated, either party can initiate the market rent review process at any stage. In 2007, a smaller retailer identified that small retailers were less willing to initiate a rent review against landlords in order to maintain an amicable relationship.

During the rent review process one retailer identified that he hires a retail lease consultant to negotiate the lease agreement on his behalf. A retail consultant has the knowledge to negotiate the best lease terms and eliminates a tenant's personal reaction to difficult negotiations.

A small retailer identified that some landlords are less willing to negotiate alternative rental terms with tenants who do not contribute value to a retail centre, have a recognised brand which draws consumer traffic, or if another tenant could be readily found for the same rent.

Section 13 of the CTA provides tenants entering a new retail shop for the first time the right to at least five years' tenancy to help establish and develop the business. A tenant may negotiate a shorter lease term with the landlord. Small retailers advised that it is important to maintain flexibility in the lease term to allow new tenants the ability to test the market without locking the tenant into a long term lease.

Industry code for valuation of market rent

Section 11(2)(a) of the CTA provides for all relevant factors, matters and variables used in proper land valuation practice to be considered when determining market rent during a rental review. It was also highlighted that some valuers and property owners continue to confuse evidence of best and highest rent with market rent.

RTA is of the view that despite the current provisions in the legislation a number of practical impediments exist when determining a fair and equitable market rent. A contributing factor is the absence of a definitive valuation industry standard in respect of retail specific rentals.

The Australian Property Institute (API) occasionally publishes Practice Standards and Guidance Notes to assist in the professional advancement of the valuation industry and its individual members.

Under section 15 of the CTA the Commercial Tribunal considers applicable industry codes when determining matters of unconscionable conduct, if it was reasonable to believe that a party was expected to comply with the code. The CTA provides no reference to a retail specific industry code which tenants or landlords could reasonably be expected to comply.

RTA is of the view the Inquiry should investigate the merit of requesting the API to produce a retail specific market rent guidance note and that such a document subsequently be given status under the legislation.

The guidance note should identify the range of factors, matters and variables a valuer must take into account when determining comparability between the premises the subject of a market rent review and other premises. A non-exclusive list of such factors, matters and variables may include:

- rental evidence of comparable premises;
- level and nature of outgoings paid;
- location and traffic flows;
- size of premises;
- permitted use;
- tenancy mix and number of competing tenancy within the centre; and
- effective rent after allowing for leasing incentives, rent free periods, fit out contributions or any other off-lease agreement that reduced the value of the lease.

Recommendation 7: That the Inquiry consider the merit of inviting the Australian Property Institute to prepare appropriate retail specific market rental practice standards and guidance notes with a view to include reference to such documents in the national uniform legislation.

Rent based on turnover

Section 8 of the CTA voids lease clauses which force tenants to disclose business turnover figures to a landlord, other than when rent is calculated either in whole or in part as a percentage of turnover.

There is a body of evidence to suggest that some landlords use this information to determine a tenant's capacity to pay rent and thereby secure rentals that would otherwise be unobtainable if the premises were offered in a free and open market, unoccupied and with similar conditions. By determining rentals in this manner the landlord is capitalising on the tenant's goodwill and lack of alternative space.

The disclosure of turnover figures enables a landlord to secure premium rents rather than market rents. RTA believes that the disclosure of turnover figures should only be allowed where turnover is the **sole** determinant of rent.

Recommendation 8: That national uniform legislation voids provisions in a lease that requires a tenant to supply turnover figures to the landlord, other than where the rent is determined solely by reference to turnover.

Relocation and Redevelopment

The CTA provides minimal protection for tenants in the event of redevelopment and relocation. Section 14 of the CTA relates to compensation from landlords and is the main section in the CTA to provide reference to relocation and redevelopment events.

The CTA does not provide for fair conduct between tenants and landlords, as opposed to unconscionable conduct. A retailer identified that landlords are able to add or alter the marketing mix of tenants without consideration for existing retailers' market share, cost structures or rent. Landlords may create excessive competition in a speciality

retail category like coffee shops, books stores, oriential food retailer, etc. which can dramatically impact tenants' business viability.

Retail tenancy leases often include relocation and redevelopment clauses. Tenants which have built considerable business goodwill in a building may, on very short notice, be told to vacate under a redevelopment or relocation clause in the lease without any or adequate compensation.

For example one small retailer's lease states;

> "If at any time the Landlord wishes to renovate, demolish, alter or extend the whole or any part of the Centre ("the Redevelopment") and:
> (a) requires the whole or any part of the Premises for the purposes of the Redevelopment; or
> (b) the premises in whole or in part will be made or is likely to be made unsafe or wholly inaccessible whether temporarily or permanently as a result of the Redevelopment,
> then the Landlord may terminate this Lease and the term or any extension or renewal thereof on the terms set out in this clause."
>
> "In the event that:
> (a) The Retail Shops Act does not apply to this Lease; or
> (b) The Retail Shops Act applies to this lease; but the Tenant has had possession of the Premises for at least 5 years as at the Expiry Date;
> Then the Landlord shall not be obliged to offer alternative premises to the Tenant, and clauses 26.7 and 26.23 shall not apply. The Tenant shall vacate the Premises on the Expiry Date as set out in clause 26.3 and the Tenant shall have no further rights in respect of this Lease."

Redevelopment and relocation provisions in other States such as New South Wales provide extensive protection.

Recommendation 9: That the Inquiry examines the relevant section of the Retail Leases Act (NSW) with a view to adopt similar provisions to protect tenants from relocation and redevelopment clauses in national uniform legislation.

Sinking funds

Section 12(a) of the CTA allows contributions to a sinking fund for the purpose of repairs and maintenance or a similar purpose (which may extend to depreciation). The purpose of the sinking fund needs to be stated in the retail shop lease and may only be used for the stated purpose.

In 2002, the WA Government Review of CTA recommended that sinking funds should continue to be available to landlords. RTA continues to see benefit in removing sinking funds from the CTA as they are complicated and costly in operation for both parties to a lease.

Recommendation 11: That national uniform legislation prohibit tenants from being required to contribute to a sinking fund for any purpose.

Expiry and renewal of leases

RTA is of the view that legislative protection must exist to prevent an existing tenant being exploited at the end of a lease. There is evidence that existing tenants are vulnerable to exploitation at the lease end because of an imbalance in the bargaining strength of the parties. This results from:

(i) Planning constraints
Planning regulations generally restrict the availability of premium retail space and confine the available space to locations determined by planning policy. A retailer may have little or no opportunity of securing suitable alternative space in a particular locality if the landlord decides not to renew the lease or seeks a rent that is beyond the capacity of the lessee to pay as a condition of renewing a lease.

(ii) A fixed investment
An existing tenant is generally reluctant to relocate even if suitable premises were available because of the substantial investment made in the tenancy through fit-out costs and other expense items. Little of this investment would be recoverable if the tenant was forced to relocate to alternative premises. In addition, the tenant would be faced with substantial new investment in fitting out new premises.

(iii) Disclosure of turnover
When rent is calculated as a percentage of turnover the tenant must provide the monthly turnover of the business to the landlord. Landlords can negotiate rent from a position of strength as they have information about the trading performance and profitability of all tenants in the retail complex which paying rent based on a percentage of turnover. See recommendation 7 regarding rent based on turnover.

RTA believes that both tenants and landlords should have an implied right of "fair treatment" at lease end and it would be beneficial to foster a cooperative negotiating environment at lease end.

Section 13 of the CTA provides tenants with the right to a five year lease with an option for a further five years. Section 13(b) of the CTA provides provisions regarding how renewal notices should be administered when the term of the lease expires. Landlords are not required, under the notice of renewal, to specify rent until 3 months before the expiry of the lease.

Section 13(b) of the CTA provides for notices of renewal of a lease, and is not as efficient as that prevailing in other jurisdictions and could be improved. RTA considers that the legislation should be amended to require a landlord, no less than six months and not more than twelve months prior to the expiry of a lease, to offer a renewal of the lease and specify the terms, including rent, or inform the tenant that the landlord does not intend to offer a renewal.

Recommendation 12: That national uniform legislation includes other jurisdictions, particular the Retail Leases Act (NSW), provisions for notice of renewal of a lease.

Measure to improve transparency and competitiveness

The inquiry will assess measures to improve the transparency and competitiveness of the market for retail tenancy leases.

Unconscionable conduct referral

In 1998, RTA reached an agreement with the Property Council of Australia on the draw down of section 51AC of the Trade Practices Act 1974 relating to matters of unconscionable conduct.

The agreement between RTA and the Property Council was predicated on recognition of the need for WA's Commercial Tribunal to be capable of dealing with lease related unconscionable conduct matters with the necessary degree of legal authority and proper legal protection for the parties.

RTA also recommended that unconscionable conduct matters should be heard by a Judge of Supreme Court with appeals to the Supreme Court on questions of merit.

In 2007, the Retail Shops and Fair Trading Legislation Amendment Act 2005 (RSFT Act) introduced unconscionable conduct provisions to the CTA. The RSFT Act does not include provisions that allow appeal from a Commercial Tribunal ruling.

Recommendation 13: That national uniform legislation adopt a provision to allow matters of unconscionable conduct to be heard by the Supreme Court in appropriate circumstances as in NSW (see e.g. section 76(a) Retail Leases Act 1994 (NSW)).

Landlord's legal costs

Section 12 of the CTA relates to tenants' contribution to landlord's regular operating expenses and does not include reference to who pays the cost of preparing and negotiating a lease.

Some smaller retailers highlighted that in addition to tenant's own legal costs, retail leases generally include provisions making tenants pay the landlord's legal costs in preparing and negotiating the lease.

For example one small retailer's lease states:

> "4.1. The Tenant must pay the Landlord, or as the Landlord directs: …
> (f) the reasonable cost to the Landlord of dealing with any application by the Tenant for the Landlord's consent under this lease;
> (g) the Landlord's costs and expenses in connection with the instructions, preparation, execution, stamping and registration of this Lease, and any surrender of this lease, or any renewal or variation of this Lease, including all stamp duty thereon;
> (h) the Landlord's costs of compliance with the provisions of Section 81 of the Property law Act 1969 whether or not the Tenant may have applied to Court (whether successfully or not) for relief pursuant to Section 81(2) of the Property Law Act 1969;…
> (j) any legal costs incurred or payable by the Landlord under this clause 4.1."

Some smaller tenants considered paying landlord's legal costs to undermine the tenant's bargaining position, as tenants may attempt to reduce the time spent negotiating to avoid legal costs.

Recommendation 14: The national uniform legislation provide a provision that a tenant shall be liable for no more than 50% of the landlord's expenses in preparing a lease within 30 days of being provided with a copy of the account.

End Notes

[1] National Competition Council, *Review of Government Progress in Implementing NCP Reforms*, October 2005. Page 14.31.

Addendum One

Addendum one is a letter addressed to the RTA from the WA Department of Consumer and Employment Protection.