



Government of **Western Australia**

Small Business Development Corporation



www.smallbusiness.wa.gov.au

Our Ref: D14/1772

Costs of Retail Trade Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
Email: retail.trade@pc.gov.au

COSTS OF DOING BUSINESS IN AUSTRALIA: RETAIL TRADE INDUSTRY

The Small Business Development Corporation ('SBDC') welcomes the opportunity to provide comments to the Productivity Commission's issues paper on the *Relative Costs of Doing Business in Australia: Retail Trade Industry*.

Role of the SBDC

The SBDC is an independent statutory authority of the Western Australian Government and was established to facilitate the development and growth of small businesses in this State. The SBDC has been providing assistance to small business owners for 30 years and in that time has acquired extensive knowledge regarding the issues facing the sector in Western Australia.

One of the SBDC's key strategic objectives is to advocate for a fair, conducive and productive environment for small businesses in Western Australia. The SBDC strives to achieve this by taking a leading role in influencing the policy and regulatory environment for small business. The SBDC helps foster the growth and development of the small business sector through the provision of education materials, workshops and the provision of tailored business and commercial tenancy advice, amongst other things. This advisory service assists small businesses to minimise their exposure to risk and therefore disputes.

In 2011, the *Small Business Development Corporation Act 1984* was amended to introduce the role of the Small Business Commissioner and establish an alternative dispute resolution service to assist small businesses to resolve their business-to-business and business-to-government disputes.

Retail Trade in Western Australia

Due to the limited time for this initial consultation, the SBDC has not been able to undertake a thorough analysis of the retail trade industry in Western Australia or gather qualitative evidence of the costs of doing business across the industry. The purpose of this submission is to highlight specific policy settings that contribute to the costs of doing business for retailers in this State. In reviewing the issues paper, the SBDC offers the following comments in relation to wages and labour on-costs, occupancy costs and rent, and development and planning policies.

Wages and Labour On-Costs

In Western Australia, the retail trade industry had a combined turnover of \$29,733 million in the financial year 2011-12, with the majority of this accounted for by food retailers. Over 134,200 people were employed in the industry as at 2012.¹

A significant cost of doing business for most retailers relates to the wages and labour on-costs of employing staff.

Currently, Western Australia is the only State to have retained its own industrial relations ('IR') system. Depending on their company structure, this has resulted in some retailers falling under the State Award with other retailers complying with the Federal Modern Awards as part of the Australian workplace system.

Having two separate IR systems creates advantages and disadvantages for retailers as the provisions available in each system's awards are non-identical. In particular, the classification of penalty rates and when they apply can provide a significant advantage to one retailer over another depending on certain circumstances.

In addition to these variances in IR systems, retail trading hours remain largely regulated in Western Australia. Indeed, this State continues to have the most restrictive retail trading hours in Australia.

The *Retail Trading Hours Act 1987* classifies retail stores as either 'general', 'small' or 'special' retail and prescribes the types of retail goods that may be sold by these stores based upon their classification, along with the hours in which they may operate. In line with this, the State Award differentiates ordinary hours based upon this store classification. This variation impacts on penalty rates payable to employees that work outside their ordinary hours.

As it currently stands, when comparing the awards for the retail trade industry in Western Australia, businesses under the Australian workplace system are required to pay 150% or 175%² of the ordinary wage for weekend overtime respectively, compared to those under the State Awards where 200% of the ordinary wage is payable for weekend overtime work.³ This can create advantages for some retailers as their wage costs may be less than that of a competitor that trades the same hours. In addition, competition for staff may also impact on retail businesses as part-time and casual employees may prefer to maximize their wages by specifically targeting employers that pay higher penalty rates.

Occupancy Costs and Rent

Another significant outlay for ('bricks and mortar') retailers is the cost associated with leasing retail premises. The SBDC notes that legislation regulating commercial tenancy agreements varies across States and Territories. In Western Australia, the *Commercial Tenancy (Retail Shops) Agreements Act 1985* ('the CT Act') provides some protections for retail shop tenants.

Some specific protections which exist in the CT Act and may not exist in other jurisdictions include:

¹ Australian Bureau of Statistics, "Western Australia at a Glance, 2013" (Cat. 1306.5)

² General Retail Industry Award 2010.

³ Shop and Warehouse (Wholesale and Retail Establishment) State Award 1977

- Limiting how much a landlord can charge a tenant under the “relevant proportion test”, which must be outlined in the disclosure statement;
- Prohibiting the inclusion of management fees in the outgoings charged by a landlord to a tenant; and
- Requiring disclosure of a full operating expenses budget to be provided to a prospective tenant prior to them entering into a new lease agreement.

The CT Act also provides other protections including in relation to market rent reviews and lease options. The market rent review options enable the tenant to seek advice from an independent valuer on the market rent and also enshrines that the valuer does not take into account the value of: the goodwill of the retail business; the tenant’s stock, fixtures or fittings in the retail shop; and the works carried out to the retail shop premises by, or at the expense of, the tenant.

In relation to lease options, the CT Act creates a basic right (in most circumstances) for retail tenants to be granted an option to extend the lease to a minimum lease period of five years. The inclusion of this protection provides tenants with some certainty regarding their lease options.

As part of its core role, the SBDC provides a specialist commercial tenancy advisory service to both landlords and tenants operating in Western Australia. For the 2012-13 period, this service responded to 2,037 enquiries regarding commercial tenancies, with 689 of these dispute related. Additionally, the SBDC’s low-cost, non-litigious alternative dispute resolution (‘ADR’) service has provided intensive case management and guided resolution to 132 commercial tenancy disputes during this same period.

The CT Act requires that retail tenancy disputes must be reviewed by the Small Business Commissioner and mediation attempted prior to the matter being heard by the State Administrative Tribunal (‘SAT’). This has resulted in a significant reduction in the number of retail tenancy disputes being referred to the SAT.

The ADR process not only reduces the length of time and the costs associated with resolving disputes, it may also reduce the number of small business disputes that go unaddressed due to the reluctance of parties to pursue a matter in a more formal and costly legal setting. Often the costs associated with formal court action can act as a deterrent for businesses and as such go unresolved, which may impact not only on the bottom line of the business concerned but also potentially ongoing business relationships.

The SBDC notes that a particular recommendation from the Productivity Commission’s 2011 *Inquiry into the Economic Structure and Performance of the Australian Retail Industry* was to ensure that the National Retail Tenancy Working Group (‘NRTWG’) projects were fully implemented. It should be noted that together with the Western Australian Department of Commerce, the SBDC represented the State on the NRTWG.

The NRTWG was disbanded in 2012 after it was unable to achieve national harmonization on a number of key retail tenancy issues. The main reason for this was the variation in commercial tenancy legislation across States and Territories. Attempts by the working group to produce a nationally consistent disclosure statement were not able to be implemented and enforced without existing legislation being amended. As there was no appetite for this to occur at the State level, the NRTWG was unable to effectively introduce any significant changes.

Development and Planning Considerations

Recommendations 8.1 and 8.2 from the *Inquiry into the Economic Structure and Performance of the Australian Retail Industry* deal with development and planning considerations.

In Western Australia, major reforms have occurred at the State Government level to improve planning and development approval processes. Some of these reforms include the drafting of a *State Planning Strategy* and inclusion of professional input for major developments through the establishment of Development Assessment Panels. Further reforms in this area are currently being considered by the State Government.

The SBDC notes that poor planning and development processes can have significant and long-term impacts on the viability of retail businesses and contribute to higher operating costs. For instance, the SBDC is aware of a restrictive covenant being placed on land use in the suburb of Ellenbrook in the Perth metropolitan area. The covenant effectively restricts the type of retail businesses allowed to operate in the suburb, which has provided exclusivity to one landlord to develop a shopping centre. Initially, the covenant was put in place to attract a large retail tenant to the area and create shopping facilities in the locality at a time when broader community infrastructure was still under development.

Enacted in 2003, the covenant remains in place until 2018. Throughout this period, retail development in Ellenbrook is being severely restricted which therefore also limits competition. Since its introduction, the locality's population has grown significantly and consumers continue to raise concerns about the lack of retail amenities available locally.

This type of restrictive planning arrangement stymies competition, reducing choice for consumers and artificially enabling landlords to charge higher rents.

Having said that, the SBDC understands that this type of restrictive covenant is not widely utilised in Western Australia. However, this situation highlights the need for both State and Local Government planning and development agencies to ensure that competition is not needlessly restricted and that impacts of possible future retail locations on existing shopping centre viability (but not specific businesses) should only be considered during strategic planning preparation and not for site-specific rezoning or individual development applications.

In conclusion, the SBDC looks forward to the release of the Productivity Commission's interim report on the *Relative Costs of Doing Business in Australia: Retail Trade Industry*, at which time further comment may be provided. If you would like to discuss this submission in more detail, please contact Ms Lisa Legena, Senior Policy and Advocacy Officer, on (08) 6552 3378 or email lisa.legena@smallbusiness.wa.gov.au.

Yours sincerely

Jacky Finlayson
A/SMALL BUSINESS COMMISSIONER