

EXPLANATORY MEMORANDUM

*Retail Shops and Fair Trading Legislation Amendment Bill
2005*

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Overview of Bill

The purpose of the *Retail Shops and Fair Trading Legislation Amendment Bill 2005* is to confirm the existing arrangements for retail trading hours in Western Australia. The Bill also introduces the Small Business Legislative Protection Package.

At a broad level, the Bill:

- i) confirms the current trading hours regime in the metropolitan and non-metropolitan area (including the differentiation of motor vehicle shops);
- ii) confirms the existing standard hours and policy for non-metropolitan trading hours;
- iii) includes the Small Business Legislative Protection Package which consists of the provisions identified below.
 - Amendments to the *Fair Trading Act 1987* (FTA) to mirror section 51AC of the *Trade Practices Act 1974* (TPA) will incorporate provisions prohibiting unconscionable conduct in business to business transactions.
 - Amendments to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (Commercial Tenancy Act) will incorporate unconscionability provisions that specifically pertain to commercial tenancies. The provisions mirror section 77(2) of the *Retail Leases Act 2002 (Vic)* with certain limited exceptions and variations.
 - Amendments will provide the State Administrative Tribunal with the jurisdiction to hear retail tenancy disputes regarding unconscionable conduct.
 - Amendments to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* provides protection for tenants to form and join tenants' associations and other similar bodies.

The need for the amendments to confirm the existing trading hours arrangements arose from State Solicitor's Office (SSO) advice, which raised serious doubts about the legal validity of the current trading hours regime.

SSO advised that a number of Ministerial Orders including the 1994 and 1996 orders relating to small shops and tourism precincts could be subject to legal challenge. Problems had arisen where the Ministerial Orders substantially varied the operation of the substantive provisions of the *Retail Trading Hours Act 1987*. SSO advised that such Ministerial Orders could be considered *ultra vires* (beyond power).

A number of references are made in this memorandum to Ministerial Orders. In many instances the substance of existing Ministerial Orders have been included as amendments to the *Retail Trading Hours Act 1987* to overcome the problems identified by SSO.

The Bill also confirms the result of the referendum held at the 2005 General Election. The first question put to voters was whether the Western Australian community would benefit if trading hours in the Perth Metropolitan Area were extended to allow general retail shops to trade until 9pm Monday to Friday. The second question asked whether the Western Australian community would benefit if trading hours in the Perth Metropolitan Area were extended to allow general retail shops to trade six hours on Sunday. Both questions were defeated, with approximately 60% of electors voting 'no' to extended trading.

In accordance with the referendum result, the Bill confirms the current retail trading hours regime.

Part 1 – Preliminary

Clause 1 Short title and citation.

Clause 2 Sets out the commencement provisions.

Subclause (1) provides that the proposed Act will come into operation on a day fixed by proclamation.

Subclause (2) provides that different days may be fixed under subclause (1) for different provisions.

Part 2 – *Retail Trading Hours Act 1987*

References in this part of the memorandum to “Act” refer to the *Retail Trading Hours Act 1987*.

Division 1 – The Act amended

Clause 3 Confirms that the following amendments in this Part are to the *Retail Trading Hours Act 1987*.

- Clause 4 This clause defines certain words and expressions used in the proposed Act.
- “**motor vehicle**” has the same meaning as in section 5(1) of the *Road Traffic Act 1974*.
- “**motor vehicle shop**” means a general retail shop or portion of such a shop where motor vehicles are sold by way of retail sale or from which spare parts for motor vehicles are sold by way of retail sale in conjunction with the sale of motor vehicles.
- Clause 5 This clause replaces section 5 of the Act which provided a general head of power for the Minister to approve exemptions from the Act.
- Subclause (1) provides that an Order made under this Act is subsidiary legislation for the purposes of the *Interpretation Act 1984*.
- Subclause (2) provides that Orders made under section 10(3b) or 14B(4) must be laid before each House of Parliament pursuant to section 42 of the *Interpretation Act 1984*.
- Clause 6 This clause amends the Act to include the substance of the *Retail Trading Hours Exemption Order (No.12) 1994* which varied certain provisions of the Act relating to small retail shops. The amendments confirm existing arrangements for small retail shops as provided in this Ministerial Order.
- Subclause (1) amends the criteria for a retail shop to qualify as a small retail shop as set out in section 10(3) of the Act.
- Small retail shops cannot sell motor vehicles or other goods or services prescribed for this purpose.
 - The number of eligible persons trading in partnership or as a body corporate is amended from 4 to 6 eligible persons.
 - The number of people who can work in a small retail shop at any time is amended from 5 to 10.
 - No owner is related in the opinion of the Chief Executive Officer (CEO) to another owner who is in such close proximity to be in effect, occupying the same location.
- Subclause (2) amends the criteria for an eligible person who seeks to own a small retail shop. The number of shops that an eligible person can own, either alone or together with any other person, is amended from 2 to 3 retail shops.
- Subclause (3) amends the criteria for ownership where a small shop is owned by a group of persons as set out in section 10(3a)(b) of the Act. The amendments confirm that a person cannot own or operate, either alone or together with any other person, more than 3 retail shops.

Subclause (4) provides for the matters, to which the CEO may have regard, when determining whether an owner of a retail shop is related to an owner of another retail shop. Additional factors to those listed in the Ministerial Order have been included to update the relevance of this provision. The additional matters to which the CEO may have regard include whether the owners are in a de facto relationship as well as whether one of the owners is a banker or any other person acting for the owner.

A person who operates a small retail shop shall notify the CEO of any change in ownership within 14 days.

Section 10(3c) is repealed as this provision is provided for in clause 5.

Clause 7 This clause amends the provisions relating to the issuing and cancellation of small retail shop and special retail shop certificates. A certificate for a small retail shop can be cancelled if prohibited goods are sold. Similarly a certificate can be cancelled if notification of change of ownership has not been given within the required 14 days.

Clause 8 This clause provides for the standard trading hours of general retail shops for the metropolitan and non-metropolitan area.

Subclause (1) amends section 12(1) to provide that standard trading hours are subject to Orders made under section 12E(1).

Subclause (2) repeals section 12(1a), (1b) and (2) relating to Ministerial Orders. Provisions relating to Ministerial Orders have been included in clause 9 (section 12E) of the Bill.

Subclause (2) provides that the standard trading hours of general retail shops do not apply to general retail shops in the tourism precincts and holiday resorts, or to motor vehicle shops. The standard trading hours of general retail shops in tourism precincts and holiday resorts will be provided for in Ministerial Orders.

Clause 9 This clause provides for the inclusion of new sections 12A to 12E.

Section 12A provides the Minister with power to make orders designating the standard trading hours of general retail shops in the tourism precincts and holidays resorts. The existing tourism precincts in Perth and Fremantle, and the holiday resorts in Rockingham, Rottnest and Wanneroo (Yanchep and Two Rocks only), will be confirmed by Regulations.

Subclause (3) provides that those businesses that are in the immediate vicinity of the tourism precincts may also apply to the Minister for authorisation to trade during tourism precinct trading hours.

Section 12B provides for the trading hours of motor vehicle shops. These amendments incorporate the variations to trading arrangements for motor shops as provided by the *Retail Trading Hours (Motor Shops) s12 Order 1996* and *Retail Trading Hours (Motor Shops) s13 Order 1996*.

Section 12C provides that small retail shops may be open at any time.

Section 12D provides that special retail shops are required to be closed from 11:30pm to 6:00am on every day of the year.

Section 12E provides the Minister with the power to make orders varying the trading arrangements of certain categories of retail shops.

- Section 12E(1) gives the Minister's power to alter the trading arrangements of metropolitan general retail shops, non-metropolitan general retail shops, motor vehicle shops and special retail shops.
- Section 12E(2) limits the Minister's power to alter the trading hours of general retail shops in the Metropolitan area to the period 28 days before and 28 days after a public holiday or half-holiday.

Clause 10 This clause repeals section 13 relating to special provisions for certain areas and certain shops. The ability to limit the standard trading hours of general retail shops has been provided in section 12E of the Bill.

Clause 11 This clause provides for the trading arrangements of filling stations. Section 14 is replaced with new sections 14, 14A, 14B and 14C to incorporate the substance of *Retail Trading Hours (Filling Stations) Exemption Order 1995*, *Retail Trading Hours (Filling Stations) Exemption Order (No. 2) 1995* and *Retail Trading Hours (Filling Stations) Exemption Order 1996*.

Section 14 provides that filling stations may be open at any time.

Section 14A provides that the categories of goods which may be sold at filling stations outside the trading hours referred to in section 12(1) will be determined by their status as small filling stations, prescribed small filling stations (truck stops) or filling stations that do not fall within either of these categories. Regulations will be prescribed to confirm the current arrangements relating to the goods which filling stations may sell outside of the trading hours referred to in section 12(1).

Section 14B sets out the ownership requirements for small filling stations as provided in the *Retail Trading Hours (Filling Stations) Exemption Order 1995*. The changes confirm existing arrangements relating to the ownership requirements for small filling stations as provided in this Ministerial Order, consistent with the provisions relating to small retail shops.

Section 14C provides for the issuing and cancellation of certificates for small filling stations.

Clause 12 Subclause (1) amends section 15 to clarify who can apply to the CEO for a permit to vary the trading arrangements of retail shops in the metropolitan and non-metropolitan areas.

Subclause (2) amends section 15 to clarify the goods and services for which a permit can be obtained.

Subclause (3) amends section 15 to confirm that the CEO may only issue a permit if satisfied that it is not appropriate or not practicable for an Order to be made under section 12A or 12E.

Clause 13 This clause amends section 25 to confirm that a small retail shop commits an offence if it is not owned or operated in accordance with the ownership requirements of the Act. To ensure consistency with the small retail shops provisions it will be an offence if small filling stations are not owned or operated in accordance with the ownership requirements of the Act.

Clause 14 This clause amends section 41(1) to provide for a review of the Act three years following the coming into operation of this Bill.

Clause 15 This clause repeals section 43 of the Act, a spent provision that provided for the referendum on retail trading hours held during the 2005 General Election.

Clause 16 Clause 16 clarifies the terminology used in the Act in relation to the definition of an 'authorised person'. The amendment substitutes 'authorised person', a defined term, for words that in effect repeat the substance of the definition of that term.

Clause 17 This clause provides increased penalties for offences against the Act. Penalty amounts in the Act have not been increased for a number of years.

Division 2 – Validation

Clause 18 This clause provides that Ministerial Orders which have been made pursuant to sections 5, 10, 12, 13, or 14 of the Act prior to the commencement of this section are taken:

- to have been validly made under the Act;
- continue to have effect and the force of law; and
- may be amended or revoked as if they had been made under section 12E of the Act, as amended.

Part 3 – Commercial Tenancy (Retail Shops) Agreements Act 1985

The purpose of this Part is to amend the *Commercial Tenancy (Retail Shops) Agreements Act 1985* to prohibit landlords and tenants from engaging in unconscionable behaviour, and enable persons to litigate disputes of this nature in the State Administrative Tribunal (Tribunal). This Part also provides protection for tenants to form and to join tenants' associations and other similar bodies.

References to the "Act" in this part of the memorandum are to the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

- Clause 19 In clause 19 it is noted that the amendments in this Part are to the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.
- Clause 20 Clause 20 amends the long title by inserting the words 'to prohibit unconscionable conduct by landlords or tenants in relation to such agreements'.
- Clause 21 This clause amends section 3(1) to provide that the definition of "**unconscionable conduct application**" to be an application under section 15F(1) of the Act.
- Clause 22 This clause provides for the right of tenants to join and to form tenants' associations.

Subclause (1) provides that a retail shop lease is void if it has the effect of preventing or restricting tenants from forming, joining or taking part in any activities of a tenants' association or similar bodies.

Subclause (2) provides that a landlord shall not treat any less favourably a tenant who forms or joins, or who proposes to form or join, a tenants' association or similar body.

Subclause (3) provides that a tenant can apply to the Tribunal, if a landlord has failed to comply with subsection (2), for an order that the landlord pay compensation or do, or refrain from doing, anything specified in the application.

- Clause 23 This clause inserts unconscionable conduct provisions into the Act as Part IIA.

Section 15A defines various terms used in Part IIA.

"applicable industry code" means the prescribed provisions of an industry code relating to the industry.

"commencement" means the commencement of Part IIA.

"fit out costs" include the costs of providing or installing finishes, fixtures, fittings, equipment and services.

"industry code" means a code regulating the conduct of participants in the industry towards other participants or consumers.

It is noted in section 15B that Part IIA applies not only to retail shop leases commenced or renewed after the commencement of the Act, but also to those leases commenced or renewed before the commencement of the Act if it would have been applicable to that lease had the Act been in operation. Although the lease may have commenced or been renewed prior to amendment of the Act, the conduct in question must have occurred after section 15B came into operation.

Section 15C provides that a landlord cannot act unconscionably. This clause, in effect, replicates section 77 of the *Retail Leases Act (Vic) 1994* with certain limited exceptions and variations. Section 77 of the *Retail Leases Act (Vic) 1994* was based on section 51AC of the *Trade Practices Act 1974 (Cth)*. The provision has been tailored to the circumstances of retail leases. An additional matter to which the Tribunal may have regard in determining whether a landlord has engaged in conduct that is unconscionable has been included.

The matters to which the Tribunal may have regard when determining whether a landlord has acted unconscionably include the following.

- the relative bargaining strengths of the landlord and tenant;
- whether the landlord forced the tenant to engage in conduct that was not necessary for the protection of the landlord's interest;
- if the tenant was able to understand any documents relating to the lease;
- whether the landlord exerted undue influence or pressure or any unfair tactics were used against the tenant;
- the extent to which the landlord was willing to negotiate terms and conditions of the lease;
- the extent to which the landlord was reasonably willing to negotiate the rent;
- the extent to which the landlord acted in good faith;
- the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
- the extent to which the landlord required the tenant to incur unreasonable refurbishment or fit out costs.

The Tribunal cannot consider circumstances that were not reasonably foreseeable at the time of the conduct in question.

The Tribunal can consider circumstances (but not conduct) that existed before the commencement of this section.

Section 15D provides that a tenant cannot act unconscionably and includes provisions complementary to section 15C concerning the matters to which the Tribunal may have regard in determining whether a tenant acted unconscionably.

Section 15E provides that conduct is not to be deemed unconscionable merely because a person failed to renew a lease or enter into a new lease, or if the person instituted proceedings or refers a dispute or claim in relation to the lease to arbitration or if the person did not agree to the conduct of an independent valuation of current market rent.

Section 15F provides that a landlord or tenant, or former landlord or tenant, who suffers loss or damage as a result of unconscionable conduct may recover that loss or damage by applying to the Tribunal.

The application must be lodged within 6 years after the conduct alleged.

The Tribunal may make the following orders in relation to an unconscionable conduct application:

- an order that a party pay money by way of debt, damages or restitution;
- an order that a specified amount of money is not due or that a party to the proceedings is not entitled to a refund of any money paid to another party; and
- any necessary ancillary orders;

The Tribunal may impose conditions on orders made under this section; and the Tribunal may make interim orders.

Clause 24 This clause amends section 27 of the Act to provide for the jurisdiction of the Tribunal and courts to deal with unconscionable conduct applications and issues arising from those applications.

A court will not, in relation to an issue arising, have jurisdiction to hear that issue if it relates to an unconscionable conduct application which is already before the Tribunal unless:

- the unconscionable conduct application before the Tribunal is withdrawn or is dismissed for want of jurisdiction; or
- as a result of judicial review a court quashes or declares invalid an order of the Tribunal in relation to the unconscionable conduct application due to the Tribunal having no jurisdiction to hear that issue.

The Tribunal will not, in relation to an unconscionable conduct application, have jurisdiction to hear an issue which is already the subject of civil proceedings unless:

- the proceedings are transferred to the Tribunal by the court;
- the unconscionable conduct application before the court is withdrawn or is dismissed for want of jurisdiction or without deciding the issue on its merits; or
- as a result of judicial review a court quashes or declares invalid an order of the court in relation to the proceedings on the ground that the court did not have jurisdiction to hear and determine that issue.

Clause 25 This clause amends the reference to the Registrar to the Tribunal.

Part 4 – *Fair Trading Act 1987*

The purpose of this Part is to amend the *Fair Trading Act 1987* to prohibit persons from engaging in unconscionable conduct in business transactions, and enable people to litigate disputes of this nature in Western Australian courts. The Part mirrors section 51AC of the *Trade Practices Act 1974*.

Clause 26 In clause 26 it is noted that the following amendments in this Part are to the *Fair Trading Act 1987*. References to “Act” in this part of the memorandum are to the *Fair Trading Act 1987*.

Clause 27 This clause inserts section 11A into the Act.

Section 11A (1) defines various terms used in this section.

“applicable industry code” means a code of practice relating to the industry which has been prescribed under section 43 of the Act.

“commencement” means the commencement of Part 4 of the Act (proposed section 11A).

“industry code” means a code regulating the conduct of participants in the industry towards other industry participants or consumers.

“listed public company” has the same meaning as used in the *Income Tax Assessment Act 1997 (Cth)*.

Section 11A(2) prohibits conduct in trade or commerce which is, in all circumstances, unconscionable and which is connected with the supply or possible supply of goods or services to a person other than a listed company or with the acquisition or possible acquisition of goods or services from a person other than a listed company.

Section 11A(3) sets out that in determining whether a supplier has contravened section 11A(2), a court may have regard to the matters listed in paragraphs (a) to (k), as well as other matters.

Section 11A(4) sets out that in determining whether an acquirer has contravened section 11A(2), a court may have regard to the matters listed in paragraphs (a) to (k), as well as other matters.

Section 11A(5) sets out that a person does not contravene section 11A(1) merely because the person institutes legal proceedings in relation to the relevant supply, possible supply, acquisition or possible acquisition of goods or services.

Section 11A(6) sets out that in determining whether a person has contravened section 11A(2), a court may have regard to circumstances existing before the commencement of section 11A but not to any conduct engaged in before that commencement or any circumstances that were not reasonably foreseeable at the time of the alleged contravention.

Section 11A(7) and (8) clarifies that the supply or possible supply or the acquisition or possible acquisition referred to in this section must be for the purposes of trade or commerce, as well as in trade or commerce.

Section 11A(9) and (10) sets out that this section does not apply to the supply, possible supply, acquisition, or possible acquisition of goods or services if the price exceeds \$3,000,000 or any higher amount prescribed.

Section 11A(11)(a) sets out that for the purposes of section 11A(9) and (10):

- (a) the price for the supply, possible supply, acquisition, or possible acquisition referred to in this section, is taken to be the amount paid or payable by the relevant person for supply, possible supply, acquisition, or possible acquisition, subject to the other provisions;

- (b) section 6(3)(c) of the Act is taken to include a reference to the supply of goods or services or the acquisition of good or services in relation to that purchase; and

- (c) section 6(3)(d) of the Act is taken to include a reference to a person being supplied with goods or services otherwise than pursuant to a purchase and also to supply.

(d) section 5(3) of the Act is taken to include a reference to the supply of goods or services to a person or the supply of services to a person.

(e) in relation to a supply, possible supply, acquisition, or possible acquisition, where the service supplied, possibly supplied, acquired or possibly acquired comprises or includes a loan or loan facility, the price is taken to include the capital value of the loan or loan facility.

- Clause 28 This clause amends section 69 to include reference to proposed section 11A.
- Clause 29 This clause amends section 75(2) to include reference to proposed section 11A.
- Clause 30 This clause amends section 77(4), (5) and (6) to include reference to proposed section 11A.
- Clause 31 This clause amends section 79 to include reference to proposed section 11A.