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Local Government Update

A review of Local Government Law in Western Australia

Commercial Tenancy (Retail Shops) Agreement Act 1985: Unintended consequences for local government leasing

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* ("the Act") regulates retail shop leases throughout the State. The Act applies to 'retail shop' leases which are defined to include premises within retail shopping centres and premises not within such centres but used predominantly for the purpose of carrying on a business involving the sale of goods by retail. In the local government context, a common example of a 'retail shop' lease is a lease for a kiosk.

The Act was initially introduced to improve a perceived imbalance in bargaining power for small businesses in commercial transactions. However, the Act has gone beyond this and has the unintended consequence of curtailing a local government's ability to satisfy community objectives and expectations in its leasing. Pursuant to section 12C of the Act, a clause within a retail shop lease which requires a tenant to open a retail shop the subject of a lease at specified hours and specified times is void. The intent of parliament in respect of s12C was to ensure that retail shop tenants are not required by large shopping centres to keep their shops open for onerous periods of time.

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Effect on local governments

It is not unusual for local governments to want to specify minimum hours of operation in leases to satisfy community objectives. For example, in one instance a country Shire leased to an individual a coffee shop. The lease specified that the coffee shop was to be open for a minimum of five days a week. The reasoning behind this requirement was community based, as the coffee shop was the only shop of its type in the town and the local government wanted to ensure residents and visitors had a place to go for coffee. Another example is where a smaller metropolitan Shire leased to an individual a kiosk within a recreational reserve. The lease contained provisions requiring the kiosk to be

open at certain times. The reason behind the requirement being that the Shire wanted to ensure that visitors to the reserve would be able to obtain refreshments during what it considered reasonable times.

Following complaints from the community that the leased premises were not open for business as expected, the local governments attempted to enforce the 'minimum operating hours' clauses within the leases. In both cases, s12C operated to void the 'minimum operating hours' clauses with the result that the local governments could not compel the tenants to keep the kiosk or coffee shop open.

Conclusion

In the examples given, it was disappointing for the local governments that s12C operated to prevent to imposition of minimum opening times. In both cases, the required opening hours were not unreasonably onerous, were clearly contained within the request for tender for the proposed leases and had a clear community objective. Additionally, from a purely commercial point of view, rent on both premises was comparatively low.

While section 12C was inserted to protect tenant's rights, the section has the potential to prevent local governments from satisfying community objectives in commercial tenancy agreements. Given there is no provision within the Act for a local government to apply for an exemption from the need to comply with s12C, local governments should be aware that clauses in retail shop leases specifying minimum operating hours will not be enforceable.

Please contact Trudi Firth on 9383 3133 if you have any queries regarding the issues raised in this update.

The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstance of each case

