

Statutory Review of the Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)

By Trudi Firth

The Commercial Tenancy (Retail Shops) Agreement Act 1985 (WA) (**CT Act**) is currently under review. The State has issued a consultation paper, and the closing period for submissions has recently closed.

The consultation paper highlights that the WA State Government is contemplating some significant amendments to the CT Act, which will have consequences for local government landlords. The significant amendments the consultation paper considers are as follows.

1. Extending the ambit of the CT Act

The CT Act currently applies to leases for the occupation of premises that are located in a 'retail shopping centre', or located outside of a 'retail shopping centre' for businesses mostly involving the retail sale of goods or specified businesses prescribed by regulations. The regulations provide that the specified businesses are drycleaning, hairdressing, beauty therapy, shoe repair and video rental. In a local government context, the CT Act applies to leases of cafés, kiosks, restaurants, op shops, hair dressers, and similar such businesses.

The consultation paper contemplates extending the CT Act to apply to leases of small businesses that are predominantly selling or providing services, regardless of the location of the premises. Small businesses not yet covered by the CT Act that could potentially be included if the proposed amendments are made, are travel agents, real estate agents, medical services, equipment hire, fitness or wellness businesses.

2. Minimum five-year lease

The CT Act currently provides retail shop tenants with the right to a minimum five-year lease term, unless the lease term is less than six months or a SAT order is obtained. The consultation paper discusses whether more flexibility is required for tenants and landlords. A possible option, suggested in the consultation paper, is the Victorian model, where the right to a five-year term is retained, however it is possible to contract out of this right if the tenant obtains a certificate from a lawyer stating that the tenant understands the implications of waiving its statutory minimum term right. This increased flexibility would assist local governments as it would remove the need to commence an application for an order approving a term of less than 5 years, which is a not uncommon scenario.

3. Extended disclosure requirements

The CT Act currently requires landlords to complete a prescribed disclosure statement, prior to the tenant entering into the retail shop lease. The consultation paper considers whether it is appropriate for disclosure requirements to be extended to the renewal of a retail shop lease or upon the assignment of a retail shop lease.

4. Security bonds, bank and personable guarantees

Some landlords of retail premises will require a form of security from the tenant in order to protect themselves if a tenant breaches their obligations under a lease. Unlike most other jurisdictions in Australia, the CT Act does not regulate the payment or holding of security instruments, or time limits for the return of such security instruments to tenants. The consultation paper considers whether it is appropriate for the CT Act to be amended to regulate the provision and release of security instruments.

5. First right of refusal

The CT Act requires a landlord, at the tenant's request, to indicate whether they will offer a lease renewal. However, other than the statutory right to a five-year term, the landlord is not required to offer the existing lessee a lease renewal or a further lease term. The consultation paper considers whether it is appropriate for existing tenants to be provided with a preferential right to a new lease or to extend the current lease at the same premises, with certain conditions and exceptions expected to apply.

6. Early termination due to severe financial hardship

The CT Act does not currently provide for early termination of a lease by a tenant on the grounds of severe financial hardship. The consultation paper considers whether it is appropriate for the CT Act to be amended to include hardship provisions allowing for lease adjustments to provide relief and/or the tenant to terminate the lease early.

7. Minimum Trading Hours

The CT Act currently provides that a term in a lease requiring a tenant to open their retail shop for specific hours or times is void. Most other Australian jurisdictions allow for trading hours to be specified in a lease with provisions on how hours can be specified or set, and how changes to those hours can be made. The consultation paper considers whether it is appropriate for the CT Act to be amended to allow lease provisions to set core trading hours, if certain requirements are met.

Conclusion

The consultation paper considers possible wide-ranging amendments to the CT Act, which have the potential to impact local government leases. Some of the changes, if made, may provide local government with greater flexibility. In particular, any loosening of the minimum trading hours prohibition or the minimum five-year term will give local governments greater freedom and flexibility. However, the extension of the CT Act to a wider category of leases and the other prospective changes could potentially have negative impacts upon local government landlords.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Trudi Firth by email



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