

Article Information

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The impost to landlords in consequence of recent amendments to unfair contract legislation

The impact that that the Australian Consumer Law (ACL) has on leasing transactions is often overlooked with regards to the unfair contract provisions. The reality is that the unfair contract provisions may (even if they often did not previously) apply to leases unbeknownst to many landlords as a result of legislative changes.

In the context of a leasing dispute, the unfair contract provisions can be alleged by tenants to complicate disputes from a landlord's perspective. Unfair contract provisions are often going to be analysed from the perspective of the tenant and whether they are unfair to a tenant - the impact of the unfair contract provisions on the landlord may be given far less weight.

With recent changes to the ACL implementing a harsh penalty regime for breaches of the ACL for anti-competitive behaviour involving unfair contract terms (read more [here](#)), now is as good a time as ever to consider the ACL's application to leasing transactions. Lease terms should be revived imminently because even if lease provisions were previously enforceable they may now be unlawful exposing landlords to serious consequences.

When will the unfair contract provisions apply?

In addition to the punitive penalties now imposed for unfair contract terms under the ACL, section 23 of the ACL makes void any term of a "small business contract" where:

- the "small business contract" in which the term is contained is considered a "standard form contract"; and
- the term is deemed "unfair".

In the context of leasing, and assuming it is established that the lease in question is a "small business contract" considered to be a "standard form contract", if a court decides that a term is "unfair", it will be void and landlords may be made to pay damages in accordance with the punitive damages regime under the ACL. This means that the unfair term will no longer apply to the parties subject to the lease. If the rest of the lease can continue without that term, then the rest of the lease will continue to apply to the parties (noting that there are broad orders a court may make including orders to void (in its entirety), vary or refuse to enforce the lease in the more serious of cases where unfair contract terms exist).

If unfair contract terms are able to be established, tenants will be equipped with a repertoire of remedies which may make the prosecution of a claim by a landlord including on account of loss of rent (which, at face value, should not be difficult to enforce given that rent is seldomly the subject of a set off right and is typically an isolated covenant) difficult and uneconomic to prosecute detracting from the core aspects of the claim hindering a commercial outcome. In addition, the reverse burden of proof (explained below) with regards to claims predicated on a breach of the unfair contract provisions may result in landlords having to invest more time, effort, costs and resources to expedite a claim under a lease.

What is a "small business contract"?

In South Australian terms, the vast majority of leases would likely be considered "small business contracts" on the basis of an impending definition change which broadens scope to capture leases which involve a party which has fewer than 100 employees or annual turnover of less than \$10 million. Whilst this indicia may be easily satisfied, establishing whether a "standard form contract" is in existence (for the purposes of invoking the unfair contract provisions) will involve a closer

analysis of the facts applicable to the transaction (and a judicious review of the terms of the lease). The definition change comes into force and effect on 9 November 2023 and a “small business contract” will also extend to renewals of existing leases which precede this date.

What is a “standard form contract”?

The term “standard form contract” is not defined in the ACL and is a question of fact. Whilst the ACL does not define a “standard form contract”, there are considerations which a court must take into account when making a determination as to whether a lease is a “standard form contract” focused on an assessment of the power imbalance between the parties and how that may lead to the imposition of unnecessary and unjustifiable terms on small tenants and businesses. In the context of leasing, the factors relevant to whether a contract is a “standard form contract” include whether the landlord has prepared the lease (to the exclusion of the tenant) and whether that lease has been offered to a prospective tenant in a “take it or leave it” fashion.

The “take it or leave it” custom is not unusual in leasing transactions for retail shopping centres. There is a risk that cookie-cutter “take it or leave it” leasing arrangements which are managed in a manner to discourage negotiation may be put at risk of being subject to the unfair contract provisions (which override the express terms of the lease contrary to the expectations of landlords that the terms of the lease will contain their entire agreement).

Importantly, if a party to a proceeding alleges that a lease is a “standard form contract”, it is presumed to be a “standard form contract” and the onus to prove otherwise will be on the other party.

When is a term of a “standard form contract” considered to be “unfair”?

Examples of common lease terms that may be considered unfair under the ACL include (this is not intended to be an exhaustive list but commonly discernible provisions which may be at risk):

1. Termination and default clauses without an appropriate cure period. To improve prospects of enforcement, termination clauses in leases should include an appropriate cure period.
2. Provisions permitting a recovery of costs without any reasonable limitations, qualifications or caps on liability – the imposition of “reasonable” and “properly incurred” qualifiers are risk mitigators (which by themselves may not be sufficient depending upon the context of the provision and impact on the affected party).
3. Terms allowing a landlord to take possession of, and sometimes deal with, a tenant’s property left behind at the end of the lease. It is not uncommon for property to be deemed abandoned if not removed prior to lease expiry and without adequate cure periods such provisions may be put at risk of being void. These types of provisions should also be considered in the context of other consumer protection legislation including the Retail and Commercial Leases Act 1995 (SA) (**RCLA**) which has its own regime with respect to the treatment and disposition of abandoned goods.
4. A right for a landlord in a shopping centre lease to unilaterally amend the shopping centre rules – the provisions are commonplace which should be caveated to prevent rule variations being enforced to the extent they conflict with the tenant’s rights under the lease and materially impede on the tenant’s use of the premises – in addition, variations should be limited to those necessary to genuinely improve the management of the shopping centre and should only be effective once brought to the knowledge of the tenant.
5. Broad indemnities exposing the tenant to contractual liability for matters outside of its control – in order to improve the prospects of enforcement, indemnities should carve out landlord’s negligence and breach and should be confined to events/causes within the tenant’s control.
6. Forced trading hours and other provisions regulating trading hours – the RCLA contains stringent rules regulating the enforcement of trading hours which also warrants consideration when drafting these types of provisions.

What can landlords do?

Fortunately, there are a number of measures landlords and tenants can put into place to help combat their exposure to the ACL’s unfair contract provisions:

- Avoid the use of template leases containing unfair terms

Landlords should avoid rolling out “one size fits all” leases which contain unfair and onerous terms. Leases should be individually tailored to the specific arrangement being negotiated. In addition, tenants should be encouraged to obtain their own independent legal advice and should be afforded a reasonable opportunity to have a lease reviewed by a lawyer.

- Qualify unfair provisions

It is possible to rectify an inherently unfair contract term through the use of qualifiers such as the use of the word “reasonable” and by imposing other contractual controls such as cure periods and cost caps.

- Tread carefully with lease renewals

Review leases in detail when it comes time to action a renewal - if there are any unfair contract terms in a lease being renewed these should be removed or amended at the time of renewal.

- Consider whether any statutory protections apply

Fortunately, the unfair contract regime will not apply to terms or matters prescribed by the RCLA (or other legislation) - consider whether the unfair term in question is something specifically implied in a lease under the RCLA. The interaction of statutorily implied terms and the unfair contract legalisation is an important consideration in assessing enforceability.

The unfair contract provisions (in their amended form) may, in the face of a contravention, result in harsh penalties being imposed on landlords which may ultimately affect essential rights and entitlements under a lease which, prima facie, appear enforceable. It is suggested that landlords urgently audit their lease provisions.

Landlords should take a more considered approach when negotiating a lease which may include an alteration to pre-contractual practices and negotiation processes. The terms of a lease should also be closely scrutinised to assess whether the terms are reasonable to protect the legitimate interests of a landlord, and landlords may need to start approaching transactions with a balance of interests in mind (departing from historical trends). Leases containing unreasonable landlord friendly terms run the risk of being void and require close review.