



RISK OF LEASE TERMS BEING UNFAIR AND UNENFORCEABLE

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The Federal Court's declaration in the recent case of *Australian Competition and Consumer Commission (ACCC) v Servcorp Limited* [2018] FCA 1044 that certain terms in office rental contracts were unfair and void is a warning for all landlords whose leases (or other forms of rental agreements) fall under the consumer unfair contract terms regime imposed by the Australian Consumer Law (ACL) in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Servcorp Limited and two of its subsidiaries (**Servcorp**) provided serviced office spaces and virtual office services to customers. The ACCC commenced formal action against Servcorp claiming that certain terms in Servcorp's standard contract were unfair and void under the ACL.

Unfair and Void Terms

The Federal Court declared (by consent with the parties) that various terms in Servcorp's contract were unfair and void including the following:

- 1. Termination:** The right of Servcorp to terminate the services contract at any time by giving one month's notice without cause and without a requirement to pay compensation, or providing a reciprocal right.
- 2. Cost of Services:** The requirement to pay charges at a rate stipulated by Servcorp from time to time which included the right to vary the price without any requirement to act fairly or reasonably.
- 3. Forfeiture of Security Deposit:** The forfeiture of a security deposit if a refund had not been requested within a specified time rather than imposing a positive obligation to return the security deposit.
- 4. Automatic Renewal:** The automatic continuation of the services contract for the duration of the original term if either party did not give notice to terminate at a new service fee as determined by Servcorp.
- 5. Indemnity and Limitation of Liability:** The limitation that Servcorp had no liability in relation to theft, loss, or damage unless as a result of gross negligence or willful misconduct.
- 6. Notice:** A termination notice was only deemed to have been served on Servcorp if a confirmation of termination letter was received from Servcorp.

Consequences for Servcorp

The Court ordered that Servcorp:

- establish and implement a program which had the purpose of ensuring compliance with ACL and required Servcorp to procure any relevant employees and agents, participate in and administer the compliance program; and
- pay the ACCC's costs of \$150,000.00.

When does ACL Apply

The ACL's unfair contract terms regime applies if a contract was entered into on, or after, 12 November 2016 and the following requirements are satisfied:

- the contract is a "small business contract" which is a contract:
 - for the supply of goods or services;
 - where at least one party is a business that employs less than 20 people; and
 - where the upfront price payable under the contract does not exceed \$300,000, or does not exceed \$1 million if the duration is more than 12 months);

- the contract is a "standard form contract" which is presumed to be the case, unless proven otherwise, taking into account factors such as the following:
 - whether there is an unequal bargaining power;
 - whether there is any reasonable opportunity of negotiation;
 - whether the terms of the contract are tailored to the characteristics of one party or to the particular transaction; and
 - the contract includes "unfair terms" which:
 - will cause a significant imbalance of rights and obligations;
 - are not reasonably necessary to protect the legitimate interests of the party which will be advantaged by the term; and
 - will cause detriment to a party if relied upon.

Consequences for Landlords

Variations of the above unfair terms are often included in leases and property rental agreements. Additionally, it is common to see in leases other similar cases of potentially unfair terms.

Recently, the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) (which was passed on 18 October 2018) has increased the power of the ACCC (and the Australian Securities and Investments Commission) to perform more extensive investigations to determine whether a contract term is unfair. The ACCC is proactively investigating further opportunities of exercising its powers and applying the unfair contract terms regime.

As a result, legal advice should be obtained in the preparation and negotiation of leases and rental agreements which may be considered to be "standard form consumer contracts" and "small business contracts" to ensure that terms are compliant and enforceable.

It is also a timely warning to review relevant precedent leases for potentially unfair terms to avoid an investigation by the ACCC and to avoid such terms being unenforceable.

For assistance or more information about these matters, or any matters regarding Property Services, please contact Adam Raleigh.

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