



HOW THE NEW UNFAIR CONTRACT TERMS LAWS AFFECT YOUR RETAIL LEASE

Are you a Landlord or a Tenant looking to enter into a lease or renew an existing lease?

If the answer to the question is **YES**, then there are important things you need to know about your lease.

From 12 November 2016, the unfair contract terms regime contained in the Australian Consumer Law (*Competition and Consumer Act 2010* (Cth)) and the *Australian Securities and Investment Commission Act 2001* (Cth) was extended to provide small businesses with the same protections as consumers from unfair terms in standard contracts.

What Contracts are covered under new unfair laws?

The law applies to all **standard form contracts** made on or after 12 November 2016, where:

- it is for supply of goods or services or the sale or grant of an interest in land;
- at the time the contract is entered into, at least one party to the contract is a small business (employs less than 20 people, including full-time employees, part-time employees and casual employees who work on a regular and systematic basis); and
- the upfront price payable under the contract does not exceed \$300,000, or \$1 million if the contract is for more than 12 months.

In the leasing context, this will apply to leases, extensions, assignments and variations entered into on or after 12 November 2016. Accordingly, Landlords should ensure their lease terms are up to date, fair, and enforceable.

What is a standard form contract?

A standard form contract is one that has been prepared by one party to the contract (i.e Landlord or the Landlord's representative) and where the other party (i.e Tenant) has little or no opportunity to negotiate the terms.



The following factors must be considered in deciding if the contract is a standard form contract:

- the bargaining power of the contracting parties;
- whether one party was required to either accept or reject the terms of the contract in the form presented to them;
- whether the contract was prepared by one party before the parties began discussing the transaction;
- whether the parties were given an effective opportunity to negotiate the contract terms;
- whether the contract takes into account the specific characteristics of the parties to the transaction; and
- any other matter prescribed by the regulations.

What terms are considered 'unfair'?

The legislation sets out that a court will consider a term to be unfair if:

- it would cause significant imbalance in the parties' rights and obligations; and
- it is not reasonably necessary to protect the legitimate interests of the stronger party; and
- would cause detriment if it were relied on.

Some examples of lease terms which may be unfair

- A Landlord's right to unilaterally vary the shopping centre/building rules where no limitations are included in the clause. Such provisions will need to be reviewed to ensure that there are limitations on the Landlord's ability to vary the rules and to ensure the Landlord provides the Tenant with notice before any variation to the rules.
- A Landlord's right to terminate the lease for any breach by the tenant, without giving the tenant an opportunity to remedy the breach.
- A Landlord's right to deal with the Tenant's property at expiry of the lease, without giving the Tenant prior notice.
- Wide indemnities against loss suffered by the Landlord.
- Any other clause where a Landlord has ultimate discretion with no limitation.

What is the effect of having an unfair contract term?

If a court or tribunal finds that a term is unfair, the term will be void and so not binding on the parties. The remainder of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term. Further, the Court can grant an injunction, payment of money or in fact any order it thinks appropriate in the circumstances.



What should you be doing now?

Landlords

- ✓ As a Landlord, it is obviously difficult to know how many people are employed by the Tenant you are contracting with. Accordingly, when dealing with a Tenant that may well have fewer than 20 employees, it would certainly be prudent to make specific enquiry, or else consider including a term in the lease that require the Tenant to declare the number of employees.
- ✓ Keep good records of the lease negotiations.
- ✓ Be vigilant to the possibility that lease renewals or variations entered into from 12 November 2016 may be impacted by the new laws.
- ✓ Consider deleting any existing lease terms at risk of being void.
- ✓ Seek legal advice.

Tenants

- ✓ It is important that before entering into a lease, Tenants are aware of the terms contained in the lease and the potential consequences if those terms are not complied with.
- ✓ Keep good records of the lease negotiations.
- ✓ Before you sign a lease, ensure that it reflects the terms and conditions that were negotiated.
- ✓ Seek legal advice.

The Property & Leasing team at Murfett Legal are here to help.

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