

# The Impact on Commercial Leases of the Australian Consumer Law Unfair Contract Regime

**JHK Presentation to Property Funds Association of Australia 2019**

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LEGAL

## WHAT WILL BE DISCUSSED

- ✓ When the regime applies to Commercial Leases;
- ✓ The types of terms that may be unfair;
- ✓ The effect of having an unfair contract term;
- ✓ Examples of terms that may be unfair; and
- ✓ How the regime has been enforced and likely to be enforced.

# Australian Consumer Law Schedule 2 Competition and Consumer Act

- *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act (Cth)*
- 12 November 2016

## “Small Business Contract”

- ✓ For the supply of goods and services;
- ✓ At least one party is a business that employs less than 20 people;
- ✓ Upfront price payable does not exceed \$300,000, *or* does not exceed \$1million if the duration is more than 12 months; and
- ✓ The contract is a ‘standard term contract’.



## Factors Considered



- ✓ Unequal bargaining power
- ✓ Reasonable opportunity of negotiation
- ✓ Whether the terms of the contract are tailored to the characteristics of one party
- ✓ 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
- ✓ Will cause detriment to a party if relied upon

# *Australian Competition and Competition and Consumer Commission v Servecorp Limited [2018] FCA 1044*



# Servecorp Highlights

## Termination

- Right to terminate by one month's notice without cause or provision of compensation or reciprocal rights.

## Cost of Services

- Requirement to pay charges after rate stipulated by Servecorp and a right to vary the price without the requirement to act fairly or reasonably.

## Forfeiture of Security Deposit

- Forfeit if not requested within timeframe rather than a position obligation to return.

## Servecorp highlights cont...

### Automatic Renewal

- Automatic continuation of services contract if either party did not give notice.

### Indemnity and Limitation of Liability

- Servecorp asserted no liability in respect to loss, theft or damage unless as a result of gross negligence or wilful misconduct

### Notice

- Letter was only determined to have been served on Servecorp if a confirmation letter was received by Servecorp.



# Application to Leases

**Commercial Property**  
**FOR LEASE**

## Application to Leases Generally

- ✓ A lease is a contract.
- ✓ The 20 person threshold applies to the Lessee and the Landlord – *think* Trusts operating as Landlord.
- ✓ State Legislation may not be protective.
- ✓ Entire Contract Clause:
  - ✓ Common Law
  - ✓ Legislative Consumer Law

## Useful Resources

- ✓ ASIC Report 565
  - ✓ Unfair contract terms and small business loans.
- ✓ Australian Consumer Law Unfair Contract Terms
- ✓ ASIC Review of PROSPA



## Key Takeouts

1. Review your Landlord structures;
2. Review you Tenant status;
3. Review any Lease - particularly prior to 12 November 2016.

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