

**From:** [Clair Wang](#)  
**To:** [UCT Protections](#)  
**Subject:** submission on unfair contract term inrelation to the lease executed with westfield  
**Date:** Monday, 13 September 2021 3:57:29 PM

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Dear Sir / Madam,

In writing you this letter I welcome the opportunity to make a submission to Treasury about Unfair Contract Terms (**UCTs**).

### **Background**

My name is Clair Wang. I am the Director of Domesky Australia Pty Ltd ACN 613 540 337 (**Domesky**). It is a small business specialised in selling boutique homeware merchandises.

I write to you to talk about the lease we signed with Westfield at Chatswood. There are some UCTs in this lease and because of which, we suffered a great deal of turnover loss, even worsened by COVID-19.

While I appreciate the Government's efforts in combating the biggest pandemic of our lifetime and providing all possible support to anyone distressed by it, there are still many of us who are suffering both financially and mentally because we simply do not have the war chest of resources Westfield has and the Government has yet to step in to take action on our behalf.

Despite its stated commitment to helping its tenants, Westfield has insisted on Domesky and tenants alike, paying rent as usual, without any realistic reduction, by relying on those UCTs in the lease.

### **The UCTs in the Lease**

To name just a few examples:

**11.13(a)** *If the Lessee fails duly and punctually to observe and perform its obligations under this Lease, then the Lessor may apply so much of the Bank Guarantee (or security deposit as the case may be) as it reasonably necessary to compensate it for loss or damage sustained or suffered because of such breach by the Lessee. Any appropriation by the Lessor will not waive the Lessee's breach and will not prejudice any other right of the Lessor arising from such breach.*

We believe this is an UCT because the consequence of a breach such as failing to pay rent, as described here, fails to take into account the impact of COVID-19. It is utterly unfair that Westfield can just take the Bank Guarantee without any regard to the impact of COVID-19 on us.

**12.7** *The Lessee will pay to the Lessor on request its proportion of the Operating Expenses for the Centre calculated on the basis that those expenses are deemed to have been paid at the time of the obligation to pay them arose.*

We believe this is an UCT because the Operating Expenses are related to the day-to-day maintenance and management of the Centre and any such expense ought to be borne by Westfield itself. It is unfair for us to be made liable for expenses with which we have no connection nor cause to be expended.

**23.6(a)** *No waiver (whether express or implied) of any breach of any covenant, obligation or provision contained or implied in this Lease will operate as a waiver of any other breach*

*of the same or any other covenant, obligation or provision contained or implied in this Lease nor will it operate as a waiver of the essentiality of any obligation which by virtue of clause 22.3 is an essential term of this Lease.*

We believe this is an UCT because, on one reading of it, this means we are always liable for any loss or damage if there is a breach. In the mind of Westfield, once they perceive there is a breach, there is a breach no matter what, as there is no waiver that may exclude liability. It is utterly unfair that we are made liable on such absolute terms.

**25.1(c)** *In consideration of this Lease being granted at the Guarantor's request, the Guarantor, in case of default in payment of Rent or other moneys or in the performance or observance of any other obligation under this Lease, the Guarantor will pay to the Lessor its successors and assigns on request all moneys which the Lessee shall have failed to pay and also will make good to the Lessor on request all losses damages costs and expenses thereby arising or incurred by the Lessor its successors and assigns.*

We believe this is an UCT because this clause fails to take into account the impact of COVID-19 on the Guarantor's ability to pay rent. It senselessly stipulates that the Guarantor must pay to the Lessor any money it may have owed without any regard to the impact of COVID-19 on the Guarantor's ability to meet such payment. In our respectful submission, this UCT grants Westfield an utterly unfair advantage over us.

Having regard to the UCTs referred to above, that is why it is especially hard to push back its unreasonable requests for rent payment when our turnover has been decimated by the pandemic and the situation is made worse by the insertion of those same UCTs.

### **COVID-19 – A force majeure event**

We also submit that it is curious that there is no force majeure clause in this Lease that would have been relied on to deal with an event such as the COVID-19 pandemic. A clause like that would have been available to lend some assistance to us in fighting off those UCTs as referred to above, because a better rent payment plan could have been put in place to deal with our current situation as stricken by COVID-19, rather than us having to be subject to those UCTs as referred to above.

### **Next Steps**

Hence, I sincerely plead with the Government that some concrete action be taken to address the sufferings many of us have had because of those UCTs being inserted in the lease.

But for their insertion, we would not have been in a position of uneven bargain, leaving ourselves vulnerable to the exploitation of Westfield.

But for their insertion, we would not have been in a constant state of suffering in both our physical and financial well-being.

But for their insertion, we would not have been cornered into a state of desperation to seek governmental intervention like this.

Thank you for your time to read my submission.

Kind regards,

Clair Wang