

Beware unfair general security terms when dealing with SME's



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In the recent decision of *Lobux Pty Ltd v Willshaun Pty Ltd* [2022] FCA 2014, handed down on 11 March 2022 (“*the Lobax case*”) the Federal Court of Australia found that a general security clause contained within a standard form contract was unfair under the Australian Consumer Law (Schedule 2 *Competition and Consumer Act 2010* (Cth)) (**‘ACL’**) and accordingly void and unenforceable.

In this case, Lobux (‘the **Secured Party**’) had partially completed manufacture of a ‘Hooklift Backdoor Vacuum Tank’ (‘the **item**’) for Willshaun (‘the **Small Business**’). The item was to be used for waste transport purposes by the small business. Prior to completing the item, the small business removed it from the secured party’s possession to have some works done to it, but the item was never returned and the balance of the purchase price was unpaid. The small business proceeded to use the item in its business operations.

The secured party and the small business entered into a standard form contract for the supply of the item (**‘Contract’**), under which the secured party was granted a general security by the small business over all of its present and future assets as well as agreeing to the secured party retaining title until payment was fully made. These security interest were registered by the secured party on the Personal Property Securities Register (**‘PPSR’**).

The small business sought a declaration from the Court that the secured party should be prevented from enforcing its security interest on the basis that the relevant clause in the Contract was unfair and therefore void in accordance with section 250 of the (ACL). The Court agreed.

Under section 24 of the ACL, a ‘consumer contract or small business contract is unfair if:

- It would cause a significant imbalance in the parties’ rights and obligations under the contract; and
- It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.’

The Court found that the Contract already had protections in favour of the secured party through retention of title of the item until all amounts owing were paid. The additional general security under clause 12 was excessive and created a ‘significant imbalance in the parties’ rights and obligations arising under the agreement.

As a result of this decision, secured parties that seek to rely on general security clauses as additional comfort when dealing with consumers or small business customers will need to think twice.

It is clear from the *Lobux case* that it is not sufficient that businesses merely comply with the terms of the Personal Properties Security Act ('PPSA'). In many instances the reach of the ACL is far, wide and powerful and if a provision is found void under the ACL it will no longer be available, nor enforceable under the PPSA.

Accordingly, suppliers, manufacturers and other businesses that use standard form contracts need to review them to determine if their security clauses are compliant and what, if any, changes are needed to ensure that they are not found to be both unfair and unenforceable.

The contents of this article are general in nature. For advice specific to your circumstances, please contact your legal practitioner.



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