

30 May 2019

Barry Abrams
Board of Airline Representatives of Australia Inc
GPO Box 198
SYDNEY NSW 2001

Our ref: RFD:EIR:2078331

By Email

Dear Barry

Thank you for meeting with me on 21 May 2019.

1. Background

We understand that:

- (a) Sydney Airport Corporation Limited (**SACL**) requires new clauses 15.3 - 15.6 (inclusive) (**Behaviour Clauses**), to be included in its commercial sublease for offices intended to be occupied by various airlines at the International Terminal, Sydney Airport;
- (b) the Board of Airline Representatives of Australia Inc (**BARA**) has made submissions to the Productivity Commission (**Commission**) about the Behaviour Clauses; and
- (c) SACL has responded to BARA's submissions to the Commission by a further submission.

2. Advice Sought

You have instructed us to provide advice in relation to:

- (a) the reasonableness of the Behaviour Clauses; and
- (b) the validity of the submissions by SACL to the Commission in relation to BARA's submissions.

3. Reasonableness of the Behaviour Clauses

We have reviewed the Behaviour Clauses and comment as follows:

- (a) In our experience commercial office leases do not typically contain clauses equivalent to the Behaviour Clauses.
- (b) A clause like clause 15.3(a) is more typically found in a contract for personal services, such as an employment contract. It is not uncommon for an

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employment contract to prohibit an employee from bringing an employer or its brand, or in the instances of professional sportspersons a code or game, into disrepute. One recent high profile example of this is the termination of Israel Folau's contract with Rugby Australia.

- (c) Clauses like clause 15.3(b) and 15.3(c) are more typically found in a severance agreement or deed of release following an acrimonious split between two contracting parties.

Are the clauses reasonable?

- (d) To determine whether the Behaviour Clauses are reasonable, we have considered the need of SACL to protect its legitimate business interests on the one hand and the limitations and obligations placed on the airlines as a result of the Behaviour Clauses on the other hand.
- (e) Clauses 15.3 and 15.6 could render a legitimate airline complaint or a factual statement by an airline a breach of the lease and allow SACL to seek any remedies available under the lease for a breach including but not limited to:
 - (i) termination of the lease;
 - (ii) requiring the airline to immediately desist from the non-complying behaviour; or
 - (iii) an order that the relevant person/s leave the premises or the airport until such time as SACL is satisfied that the person/s will comply with the Behaviour Clauses.
- (f) As an example, whilst it may not be the intention of clause 15.3(c), if an airline employee accused a SACL contractor of sexual harassment and the accusation was reported in the media, bringing negative attention or publicity to the SACL brand or the reputation of the contractor, SACL would be entitled to enforce any of the above breach provisions against the airline complainant.
- (g) Clause 15.3 provides that a tenant must ensure that each of the "Tenant's Employees and Agents" (as defined in the lease) must comply with the standards of behaviour required by clause 15.3. There are no exceptions in clause 15.3 about when it may be appropriate for a tenant to make negative comments about SACL. We have not reviewed the definition of "Tenant's Employees and Agents" in the airline leases but other SACL leases at Sydney Airport give this a wide definition as "each of the Tenant's employees, offices, agents, contractors and invitees". This is an arduous requirement for any tenant that may not have a contract with all of these parties.
- (h) The requirements of clause 15.4(b) are particularly onerous since they have a retrospective effect. An airline would have to review all of its contracts with the "Tenant's Employees and Agents" and vary them to include the Behaviour Clauses. This would likely be a time-consuming, impractical exercise and may not be acceptable to an airline's many "Tenant's Employees and Agents" for the same reason the clauses are not acceptable to the airlines.
- (i) We agree with BARA's submission that the Behaviour Clauses have the effect of silencing any criticism or comment by airlines about the standard of services and outcomes at Sydney Airport because they are so broadly drafted. We do not consider the Behaviour Clauses are reasonably necessary to protect the legitimate business interests of SACL. The Behaviour Clauses

are one-sided and greatly favour SACL over the airlines. There does not appear to be a satisfactory commercial reason why SACL needs such powers. The airlines will be disadvantaged if they have a legitimate complaint against SACL and SACL enforces the Behaviour Clauses to silence them.

4. SACL's submissions to the Commission

We have considered the validity of SACL's submissions and comment as follows:

- (a) **SACL submission 1 - "BARA's characterisation of this issue is misleading. Sydney Airport does have clauses in some leases to ensure that tenants do not behave in a way that could adversely affect our (SACL's) reputation or brand, for example, by acting illegally or mistreating employees or customers."**

It is usual for a commercial lease to contain clauses which require a tenant to:

- (i) comply with all laws and the requirement of all authorities in connection with the premises, the tenant's business and its use and occupation of the premises;
- (ii) not do anything in or around the premises which in the landlord's reasonable opinion may be annoying, dangerous or offensive;
- (iii) conduct its business in a proper and efficient manner; and
- (iv) keep all confidential information confidential

In our opinion, SACL does not require the Behaviour Clauses to achieve its stated desired outcome because it can adequately protect itself by relying on these more usual leasing provisions.

In addition, SACL could commence proceedings for defamation or engage other litigious avenues in response to inaccurate comments or false statements from an airline or its employees that adversely affect SACL's reputation or brand.

- (b) **SACL submission 2 - "Clauses that govern a tenant's standard of behaviour are common across commercial businesses. Sydney Airport also has similar clauses in leases with retail tenants"**

Our firm specialises in real estate law and we act for a large number of national retail tenants including Bunnings, Kmart and Officeworks. We also act for major landlords including Stockland and Investa. In our experience, clauses of the nature and scope of the Behaviour Clauses are rare in commercial or retail leases other than where SACL is the landlord.

We agree that SACL also includes similar clauses to the Behaviour Clauses in its retail leases as we have reviewed other SACL retail leases. The SACL leases also contain the clauses referred to in paragraph 4(a) above.

- (c) We also agree that it is standard to include clauses which regulate a tenant's standard of carrying out the permitted use, as set out in paragraph 4(a) above, in a lease. However, we disagree that clauses equivalent to the Behaviour Clauses are common in commercial leases. As stated above, clauses which seek to control a party's behaviour in the manner set out in the Behaviour Clauses are generally associated with other commercial contracts

and agreements such as employment contracts or settlement deeds after a dispute.

- (d) **SACL submission 3 - "Sydney Airport has never attempted to enforce these contractual clauses against any airline in response to complaints or criticism, including during the Productivity Commission process."**

It is irrelevant whether SACL has attempted to enforce the Behaviour Clauses in response to a complaint or criticism. The presence of the clauses clearly intends to deter tenants from carrying out any action in breach of the clause.

We do not consider SACL's submissions are valid for the reasons stated above.

We look forward to discussing our advice with you once you have had an opportunity to consider it.

Yours faithfully

Rachel Hill | Partner

Emma Heraud | Lawyer