

The small business unfair contracts regime claims its first scalp

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Summary

On 12 November 2016, a new law came into effect that voided unfair terms in standard form contracts with small businesses.

The Australian Competition and Consumer Commission (ACCC) has now claimed its first scalp under this new law with the Federal Court decision in *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224.

Background

The *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (the Act) amended the *Australian Securities and Investments Commission Act 2001* (Cth) (with respect to contracts that are financial products or contracts for the supply, or possible supply, of financial services) and the *Competition and Consumer Act 2010* (Cth) (for all other contracts within the remit of the law) so that the unfair contracts regime that benefited consumers also benefited small businesses.

For contracts caught by the *Australian Consumer Law*, the amendments apply to standard form contracts entered into or renewed on or after 12 November 2016 where:

- the contract was for the supply of goods or services or the sale or grant of an interest in land;
- at least one of the parties was a small business (a business is a small business if it employs less than 20 people); and

- the upfront price payable under the contract was no more than \$300,000 for contracts with a term of a year or less or no more than \$1,000,000 for contracts with a term of more than one year.

A term is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- 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 has wide discretion with taking into account matters it thinks relevant in determining whether there is an unfair term. However, the court must take into account the following matters:

- the extent to which the term is transparent (that is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term); and
- the contract as a whole.

The specific background

JJ Richards & Sons Pty Ltd (**JJ Richards**) provided waste management services on its standard terms.

The ACCC claimed that JJ Richards entered into or renewed 26,000 standard term contracts which included small business contracts with unfair terms since the Act started.

The Court found that the following terms were unfair in those small business contracts:

- **Automatic renewal:** The renewed term was of equal duration to the original term, JJ Richards was not required to provide notice that the contract was about to expire, and there was a limited period in which the customer could terminate the contract.
- **Price variation:** JJ Richards could unilaterally increase the price for any reason.
- **Agreed times:** This removed any liability for JJ Richards where the customer was not in any way responsible for hindrance or prevention of JJ Richards' waste management services, or where JJ Richards was better placed than the customer to manage or mitigate the risk of the prevention or hindrance occurring.
- **No credit without variation:** JJ Richards could charge customers for services not rendered even for circumstances within JJ Richards' control.
- **Exclusivity:** This required customers to obtain all their waste management services from JJ Richards.
- **Credit terms:** Customers had to pay their account within seven days and JJ Richards could suspend services if payment was not received. JJ Richards could also continue charging the customer while services were suspended to cover costs associated with overdue payment.
- **Indemnity:** This created an unlimited indemnity in favour of JJ Richards, even where the loss incurred by JJ Richards was not the fault of the customer or could have been avoided or mitigated by JJ Richards.
- **Termination:** The customer was unable to terminate its contract while it had payments outstanding, and JJ Richards could continue charging customers equipment rental after the termination of the contract, despite the fact that no services were provided,

(the **Impugned Terms**).

On transparency, the Court dismissed the standard terms as 'a "densely packed page of small print terms and conditions"'. In particular, the Court was critical of the

standard terms having a very small font size, not being presented in a way that drew them to the customer's attention, and for being drafted in legal language and not plain English.

In taking into account the contract as a whole, the Court found that it did not appear that the Impugned Terms were substantially ameliorated by the other terms of the contract. The Court also commented that the Impugned Terms tended to exacerbate each other. That increased the overall imbalance between the parties and detriment to the customers.

Outcome

As the Impugned Terms were unfair, the Court declared them void and consequently not binding on the parties.

Otherwise, the ACCC and JJ Richards negotiated an outcome that involved JJ Richards (among other things):

- being restrained from relying on the Impugned Terms;
- being restrained from a period of five years from entering into a small business contract that contains an Impugned Term;
- within 14 days publishing notices on its website, customer portal, etc and advising each customer of the orders made by the Court; and
- within 90 days establishing and implementing for three years an 'ACL Compliance Program' for certain of its employees designed to minimise the risk of the future use, application or reliance on unfair terms.

Conclusion

If your contractual arrangements with your customers and counterparties are on standard form terms, you should consider whether you will be dealing with a small business. If so, then consider having your standard form contracts reviewed to remove any terms that may be unfair.

Subject to obvious commercial considerations, it may be useful to have separate contracts – one for small businesses and consumers (if relevant), and one for big businesses.

If you are a small business that will be signing up to a standard form contract that you believe contains an unfair term then you should request its removal.

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