

The unfair contracts regime extends its remit

Liam Williams | May 2016 | Commercial Disputes & Transactions

Summary

On 12 November 2016, a new law will come into effect that extends to small businesses the unfair contract term protections that are currently available to consumers.

This will allow a party to a standard form contract to have an unfair term in a standard form contract declared void if the party was regarded as a small business at the time of entering into the contract.

If you deal with small businesses using standard form contracts you should be reviewing your contracts now to ensure that there are no unfair terms.

Background

Since 2009 the Federal Government has been considering extending the unfair contract terms to small businesses under the guise of giving those businesses a 'fair go'. The view is that small businesses have limited market power and are just as likely as consumers to be subject to contractual arrangements that follow a standard form and were prepared by the counter party before discussions even commenced between the parties, with little ability to amend terms.

On 20 October 2015, the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (the Act) was passed by the Federal Government. The Act amends 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.

The Act comes into effect on 12 November 2016.

What will the law apply to?

The law will apply to a standard form contract entered into or renewed on or after 12 November 2016 where:

- the contract is for the supply of goods or services or the sale or grant of an interest in land. This could include service contracts (like IT contracts), equipment finance agreements, commercial leases of real property, technology licences, contracts between large retailers and suppliers, contracts for the transport of goods (other than by ship) and contracts with independent contractors;
- at least one of the parties is a small business (a business is a small business if it employs less than 20 people including casual employees employed on a regular and systematic basis – it is estimated that 95% of small businesses will be caught by this definition; and
- the upfront price payable under the contract is 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.

If a contract is varied on or after 12 November 2016 the law will apply to the varied terms.

A standard form contract is not defined under the Act, but we expect that a court or tribunal will take into account the following when considering whether a contract is a standard form contract:

- was the contract prepared by one party to the contract in advance;
- did the other party to the contract have any opportunity to negotiate the terms (that is, is it offered on a 'take it or leave it' basis);
- did the contract take into account the specific characteristics of the parties or the transaction; and
- the strength or otherwise of the bargaining power of the parties.

The law will apply even where both parties to the contract are a small business – that means that a small business may in certain circumstances be subject to an unfair contract term under one contract where it is the acquirer, and the beneficiary under an unfair contract term in another contract where it is the supplier.

What is an unfair term?

While there are no prescribed or defined unfair terms, the Act sets out examples of terms that may be unfair, including:

- terms that enable one party (but not another) to avoid or limit its obligations under the contract;
- terms that enable one party (but not another) to terminate the contract;
- terms that penalise one party (but not another) for breaching or terminating the contract;
- terms that enable one party (but not another) to vary the terms of the contract.

Ultimately, whether a term is unfair or not will be determined by a court or tribunal in the context of the entire contract and taking into consideration how easy to read and clearly presented the contract is to the affected party.

What is excluded?

There are exclusions from the law with respect to certain standard form contracts, and terms within standard form contracts.

In terms of standard form contracts, the following are excluded:

- contracts entered into before 12 November 2016 (unless renewed or varied on or after this date);
- shipping contracts;
- constitutions of companies, managed investment schemes or other kinds of bodies;
- certain insurance contracts (for example, car insurance);
- contracts in sectors exempted by the Minister – these

are intended to be exemptions where small business contracts are covered by an industry-specific law that is enforceable and equivalent. At this stage, no sectors are currently exempt.

As to terms within standard form contracts, the following are excluded:

- terms that define the main subject matter of the contract;
- terms that set the upfront price payable. This is the consideration payable that is disclosed before the contract is entered into. It does not include consideration that is contingent upon the occurrence or non-occurrence of a particular event, for example break costs or early exit fees;
- terms that are required or expressly permitted by a law of the Commonwealth, or a state or a territory (e.g. permitted under the Franchising Code or another prescribed industry code).

What is the effect of having an unfair contract?

If a court or tribunal finds that a term is unfair, the term will be void and so not binding on the parties. The remainder of the contract will continue to bind the parties to the extent the contract is capable of operating without the unfair term. Further, there are no fines or penalties for having a term declared unfair.

What should you be doing now?

If your contractual arrangements with your customers and counter parties are on standard form terms you should consider whether you will be dealing with a small business and, if so, 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.

Please contact us if you would like us to review your standard form contracts, or if you would like us to act for you in relation to negotiations with a counter party to have an unfair term removed.

**For more information,
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