

Article Information

Authors: Ian Nathaniel, Conrad Banasik

Service: Competition & Consumer

ACCC Priority - Small Business Unfair Contract Terms Legislation

The small business unfair contract term legislation has been in force for almost 2 years, and the ACCC has been making enforcement of this legislation a priority.

The small business unfair contract term legislation has been in force for almost 2 years, and the ACCC has been making enforcement of this legislation a priority.

However, ACCC Chairman Rod Sims has recently said that these changes are “deeply flawed”. He said that the law “does not go far enough, and its limitations really tie our hands as a regulator. What we want is unfair contract terms to be made illegal and we want huge penalties to apply.”

Small Business Unfair Contract Terms Legislation

On 12 November 2016 amendments to the Australian Consumer Law and Australian Securities and Investments Commission Act 2001 came into effect which extended the operation of the unfair contract terms regime to small businesses.

A “small business” is one that employs fewer than 20 employees (including casual employees engaged on a regular and systematic basis). The regime applies to standard form contracts where the consideration is \$300,000 or less (or \$1 million or less where the contract term is greater than 12 months).

A term of a contract is an unfair term if it:

1. causes a significant imbalance in the parties’ rights and obligations under the contract
2. is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term
3. would cause detriment (whether financial or otherwise) to a party if relied on (whether or not it has actually been relied on in that way by the advantaged party)

ACCC Enforcement Action

In November 2016 the ACCC published a report which reviewed a large number of standard form contracts with the participation of many businesses including Fairfax, Facebook, Optus, Coca Cola, Baker’s Delight and Uber. The report concluded that it was the ACCC’s view that many of the standard terms used by these businesses included unfair contract terms. The report led to many of those businesses amending their terms and conditions to alleviate the ACCC’s concerns.

Subsequently the ACCC has engaged in a concerted effort to enforce the small business unfair contracts term regime against large businesses. It formed part of the ACCC’s 2016, 2017 and 2018 priorities. Some of the recent enforcement action taken by the ACCC includes those against:

1. Servcorp Ltd, a multinational serviced office space provider. The Federal Court issued orders by consent declaring various terms in Servcorp’s standard terms and conditions to be unfair terms. Citation [Australian Competition and Consumer Commission v Servcorp Limited](#) [2018] FCA 1044;
2. Wisdom Properties Group Pty Ltd, a residential property developer based in NSW. The [proceedings](#) were resolved by Wisdom giving enforceable undertakings to not enforce a non-disparagement clause which was admitted to be an unfair contract term and to remove that clause from future contracts;
3. Cardtronics Australasia Pty Ltd, a supplier of ATMs. The [proceedings](#) were resolved by Cardtronics giving enforceable undertakings to not enforce terms admitted to be unfair contract terms and to remove those terms from future contracts; and

4. JJ Richards & Sons Pty Ltd, a large waste disposal business. The Federal Court issued orders by consent declaring numerous terms in JJ Richards & Sons' standard terms and conditions to be unfair terms. (citation [Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd](#) [2017] FCA 1224.

Other Proceedings

In addition to the ACCC's powers, small businesses affected by unfair contract terms can commence proceedings to restrain the other party from enforcing those terms or assert as a defence to any enforcement action against it that the terms relied on are unfair contract terms. An example of this is the matter of [Bass Coast Resort Pty Ltd v Success Resources Australia Pty Ltd \(Civil Claims\)](#) [2017] VCAT 1217, which involved a successful claim by a travel agent for a refund of the ticket price for a professional seminar that was cancelled to be rescheduled to a later time. The terms and conditions for the ticket purchase contained a clause excluding the liability of the event organiser in the event that the time or venue of the event is changed. That term was held to be an unfair contract term.

Conclusion

As can be seen, the small business unfair contract terms regime gives the ACCC and affected small businesses the ability to nullify terms which are considered by the Court or Tribunal to be unfair contract terms. The ACCC has been aggressive in pursuing large businesses to comply with the regime, and has had many successes, despite Mr Sim's proposition that the laws are too weak.

The difficulty for large businesses who provide B2B goods or services is that they often cannot reliably ascertain whether their customer is a small business or not. Therefore there is a need to ensure that any standard form contract which will potentially be entered into by a small business is compliant with the regime.

There is a clear deterrent in the current laws, which is that a company that includes an unfair term in a small business contract may find that it is unable to rely on the term at all (even to the extent that it would not be unfair to do so). A large business seeking maximum protection of its interests needs to ensure that such protections are carefully drafted, or it could risk not having any protection at all.