Article Information

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Unfair terms in the construction industry | First Judicial Consideration

It has now been one year since the 'unfair term' provisions contained in the Australian Consumer Law came into effect. Given that standard form contracts are commonplace in the construction industry, it is important that contractors and suppliers remain aware of their potential effects.

Unfair term provisions

Since 12 November 2016, 'standard form contracts' of a value of up to $300,000 (or up to $1,000,000 for terms longer than 12 months) involving a business employing less than 20 employees which contain an 'unfair term' are liable to have such terms made void by the *Australian Consumer Law*. Whether a contract is a "standard form contract" depends on the relative bargaining power of parties and ability to negotiate terms.

'Unfair' contract terms are terms that:

1. cause a significant imbalance between the parties' rights and obligations;
2. are not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
3. cause detriment to a party if relied upon.

Recent judicial consideration

In *ACCC v JJ Richards & Sons Pty Ltd*[1], the Federal Court recently found that eight clauses contained in the JJ Richards' standard form contract were 'unfair contract terms'.

Two of the clauses considered by the Court are frequently used within construction services and supply agreements. These terms provided that:

1. JJ Richards did not accept any liability for inability to perform the services at the agreed time where such performance was prevented or hindered in any way; and
2. The customer indemnified JJ Richards from all liabilities, claims, damages, actions, costs and expenses which may be incurred by JJ Richards on a full indemnity basis (whether successful or not) as a result of or arising out of or other than in connection with the agreement.

The Court considered that the terms required the customer to assume risk in circumstances that went beyond their control, and where JJ Richards was better able to manage or mitigate such risks. The Court found that these terms caused a significant imbalance in the parties' rights, and went beyond what was reasonably necessary to protect JJ Richards' legitimate interests.

The indemnity clause was also found to provide the customer no corresponding benefit whatsoever.

The Court also remarked that the terms of the contract were not transparent because the terms were drafted in **legal language** (rather than plain English), were presented in small font size and in a way that did not draw attention to the **unfair** terms (as distinct from the other terms).

The standard form contracts, as executed, were identical, with the only differences being that the duration of the contracts

differed, one or two clauses had been struck out in some of the contracts and the time period in one of the clauses had been changed in a small number of the contracts.

Recommendations

This case makes it clear that the ACCC will pursue businesses with standard form contracts containing unfair terms.

As such, parties with standard form contracts should look to avoid terms providing only one party a right (eg. a right to avoid liability, terminate or vary the contract) or penalising a party in respect of breach or termination. Where an indemnity is provided, it should also be limited to the extent that the customer caused the loss or damage.

Parties should consider reviewing or amending their contracts to use plain language and making them easy to read by using a reasonable font.

This decision indicates that minor changes to a standard form contract are insufficient to take it out of the category of a 'standard form contract' for the purpose of the unfair term provisions. Parties should still look to record all proper negotiations and agreements to amend contractual provisions.

For example, contracts up the chain should look to include a qualifications table when contracting with a small business to assist with proper negotiations around potential unfair and/or overly onerous terms.

However, what this decision does show is that merely agreeing to minor amendments from a position of power, when certain onerous provisions still remain, does very little to obviate the application of the ACL.

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[1] [2017] FCA 1224. A copy of the judgment can be found here.