

Article Information

Authors: Andrea Beatty, Sarah Johnson

Service: Competition & Consumer, Corporate & Commercial

What will a tougher Unfair Contracts Regime mean for suppliers? Emerging trends in interpretation of standard form contract protections for small business

In light of growing calls for the introduction of penalties for the unfair terms in standard form contracts, we examine emerging themes in the consideration of unfair contract terms.

Calls for Reform

On 25 January 2019, Labor announced that it plans to make it illegal and impose fines of up to \$10 million on suppliers caught putting unfair terms into contracts with small business. This announcement follows a number of recent statements by the ACCC, including by Mr Rod Sims, the Chair of the ACCC, at a speech to the National Small Business Summit in which he stated that the current unfair contracts protections for small business in the Australian Consumer Law have two fundamental problems:

1. a potentially unfair contract term can be declared void but is not illegal; and
2. the ACCC cannot seek civil pecuniary penalties when a term in a contract is declared unfair and void by the court, nor can it issue infringement notices for contract terms that are likely to be unfair,

which, Mr Sims stated, means that no real incentive exists for businesses to ensure their standard contracts do not include unfair terms. As recently as 26 February 2019, in a speech to the Committee for Economic Development Australia, Mr Sims confirmed that a key advocacy priority for the ACCC in 2019 is reforming the current unfair contract laws to address these issues.

Given these recent statements and Treasury's current review of Unfair Contract Term Protections for Small Business, it would appear that there is increasing support for strengthening the Unfair Contracts Regime in the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act 2010) (ACL).

When will a contract term be unfair? The ACL provisions

Unfair contract terms are defined in the ACL as terms that:

- would cause significant imbalance in the parties' rights and obligations arising under the contract;
- are not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term; and
- would cause detriment (financial or otherwise) to a party if they were relied on.

The regime applies to standard form contracts where a party to the contract is a business that employs fewer than 20 persons and the upfront price payable under the contract does not exceed \$300,000 or \$1 million if the contract is for a duration of more than 12 months.

Unfair Contracts Recent Decisions and Undertakings

Whilst section 25 of the ACL sets out examples of the kinds of terms that may be unfair under the ACL, a review of recent ACCC media releases, undertakings by companies and case law in respect of unfair contract terms reveal that the following additional provisions may also be deemed unfair:

1. clauses that prohibit, control or prevent customers from making public statements or publishing feedback about the supplier or the supplier's performance or which require the supplier's consent to or approval of the wording of any public statement;
2. clauses that provide the supplier with an unlimited indemnity against a customer for loss arising from any public statement made by the customer about their experiences with the supplier or the supplier's performance;
3. a right of first refusal requiring the customer to notify the supplier of any offer from a third party to provide goods or services to the customer and which gives the supplier the right to enter into an agreement on the terms and conditions offered by the third party;
4. unilateral rights to change the terms of the contract, including to increase fees, decrease returns to the customer or change quality requirements, without a corresponding right for the customer to terminate the contract without financial penalty if they are dissatisfied with the change in terms;
5. automatic renewal clauses unless the agreement provides that the customer may notify the supplier that it does not wish to proceed with the renewal and the supplier writes to the customer informing the customer of its right to terminate the agreement by notifying the supplier prior to the expiry of the relevant term;
6. liquidated damages clauses that allow the supplier to impose penalties on customers who wish to exit their contracts before the end of the term of the contract;
7. broad limitations on liability or indemnities in favour of the supplier including for loss which is caused, or could be avoided or mitigated, by the supplier; and
8. clauses which permit the supplier to determine when a notice has been validly served by the customer which right, amongst other things, may permit the supplier to unilaterally determine whether the customer has validly exercised a termination right under the contract.

If your organisation uses standard form contracts that are likely to be covered by the Unfair Contracts Regime, it might be an opportune time to review the terms of those contracts in preparation for these impending changes.