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WHITE PAPER

May 2017

Australia Adds Indemnities and Limitations of Liability under Unfair Contract Terms Regime

The Australian Securities and Investments Commission Act 2010 and the Competition and Consumer Law Act have been amended to include small business contracts in addition to consumer contracts. Companies will want to consider the new amendments when entering into agreements with small businesses in order to avoid challenges to "unfair" contracts. Contracts that attempt to free companies of all liability for losses and damages suffered as a result of their own conduct are likely to face greater scrutiny.

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Recent amendments to the *Australian Securities and Investments Commission Act 2010* (Cth) ("ASIC Act") and the *Competition and Consumer Law Act* (Cth) ("CC Act") extended the unfair contract terms regime, which previously covered only consumer contracts, to small business contracts. This was partly in response to a significant number of complaints being made to the Australian Competition and Consumer Commission ("ACCC") by small businesses, which could not previously be remedied under the Australian Consumer Law ("ACL"). Although only limited guidance has been provided, here we review the principles and issues found in prior actions and statements by the relevant consumer protection agencies and courts.

Companies entering agreements with small businesses in Australia should be aware of these new avenues for challenge to "unfair" contracts. They should ensure that they do not attempt to preclude all liability for losses and damage suffered as a result of their own conduct.

THE PROHIBITION

For most purposes, the unfair contract terms regime is contained in Pt 2-3 of the ACL (Schedule 2 to the CC Act). The regime does not apply to financial services or contracts that are for financial products (as an equivalent regime for these is contained in the ASIC Act), or to small business contracts entered into or renewed prior to November 12, 2016.

In order for a term in a small business contract to breach the ACL, it must be part of a standard form contract, and it must:

- Cause a significant imbalance in the parties' rights and obligations under the contract;
- Be not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- Cause financial or other detriment to a consumer or small business if relied upon.

The CC Act also provides, without limiting the generality of the prohibition, a list of 14 kinds of terms that may be unfair, including terms that permit, or have the effect of permitting:

- One party (but not another party) to avoid or limit performance of the contract;
- One party unilaterally to determine whether the contract has been breached or to interpret its meaning; and
- A limitation on one party's right to sue another party.[1]

The Explanatory Memorandum to the Amendment Act states that between January 1, 2011, and December 31, 2014, there were 1,375 total complaints made by small businesses to the ACCC in relation to unfair contract terms (of which 115 complaints related to limitations of liability or restrictions on the right of the small business to enforce their rights under the contract).

APPLICABILITY TO LIMITATIONS OF LIABILITY AND INDEMNITIES

There has been little case law considering limitation of liability or indemnity clauses in the context of these requirements, for either consumer contracts or small business contracts. However, the ACCC and other consumer protection agencies appear to have taken the approach that they will not consider such terms to be reasonably necessary where they seek to indemnify one party or impose liability on the other party for losses caused by the conduct of the advantaged party. Types of clauses that are likely to be found to be in breach of the regime are clauses that impose complete or unlimited liability on the small business or completely indemnify the other party for property damage or financial loss caused (or contributed to) by the other party, including as a result of negligence, willful acts, fraud or breach of contract.

Conversely, it is less clear whether clauses that exclude or limit liability for indirect or consequential loss will attract enforcement actions, as the courts have rarely considered whether they are reasonably necessary to protect the liable party's legitimate interests. This is possibly because section 64 of the ACL provides that a term of a contract is void to the extent that the term purports to exclude, restrict or modify any liability (including for reasonably foreseeable consequential loss) of a person for a failure to comply with a consumer guarantee (a separate regime under the ACL that does not apply to small businesses).

It is also unclear how the regime will be applied to indemnities or limitations on liability for injury or death, or for intellectual property infringement in small business contracts (terms that suppliers and service providers commonly include in their customer contracts). While terms that impose unlimited liability or

an absolute indemnity for any injury, death or intellectual property infringement caused by either party in any circumstances are possibly not permissible, there is little guidance as yet (by the courts, Parliament or the consumer protection agencies) on how broad terms of this nature need to be in order to be held to be in breach of the CC Act.

GUIDANCE FROM COURT AND TRIBUNAL DECISIONS

Although not authoritative, two recent Victorian Civil and Administrative Tribunal ("VCAT") decisions provide some assistance. One of these, *Ballard v Sebring Pty Ltd* [2014] VCAT 1636, illustrates that a term is not unfair merely because it imposes no-fault liability; it must cause a significant imbalance in the parties' rights and obligations and must not be reasonably necessary to protect the legitimate interests of the party advantaged by the term. In this case, a term in a Europcar rental agreement for a commercial vehicle excluded cover for damage or third-party loss when the commercial vehicle is driven in reverse. The Tribunal considered that while the exclusion clause contained an imbalance in the parties' rights in contravention of the analogous *Fair Trading Act 1999* (Vic), it was not satisfied that this imbalance was significant in terms of the contract as a whole, in part because the hirer could have opted to hire a smaller vehicle under an agreement that did not contain the exclusion clause.

Terms of Europcar's rental agreements were also found by the Federal Court to be unfair in *ACCC v CLA Trading Pty Ltd* [2016] FCA 377 under the ASIC Act. In this case, Europcar sought to impose no-fault liability on its customers and unlimited liability for any damage to the vehicle, loss of the vehicle as a result of theft and third-party loss. Gilmour J held that these terms created a significant imbalance in the rights of the parties and were not reasonably necessary in order to protect Europcar's legitimate interests. However, he stated that it was not the fact that the terms imposed no-fault liability that rendered them unfair; rather, it was the way in which those terms operated. In fact, he held that a clause that provided that the customer must pay all reasonable costs to return the vehicle to the same condition it was in at the start of the rental, regardless of fault, was not an unfair term.

However, a term that provided that the customer was always required to pay if there was damage, theft of the vehicle or third-party loss was held to be unfair. Gilmour J reached this conclusion by comparing the effect of the contract including the term and the effect it would have without it; if "no fault" liability was not imposed on the customer, he or she would be liable only if he or she was at fault under the ordinary principles of negligence.

In *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754, the Tribunal held the following terms to be unfair:

- A term providing that the client accept "any financial detriment or other losses" and that the removalist "shall NOT be responsible or liable for such losses";
- A term providing that the removalist shall not be liable for any loss or damage suffered by the client directly or indirectly caused by damage, loss or destruction to the goods whilst in the possession of the removalist in transit, storage or after delivery, including due to a misdelivery or carriage of the goods by a route other than the shortest or usual route; and
- A term providing an indemnity against any action, claim, suit, fine or demand brought by any third party, the client or the contractor.

These terms were considered unfair because they had the object or effect of unreasonably limiting the removalist's liability for matters under the removalist's control, including for losses caused by the removalist's willful, fraudulent or negligent conduct. They also conferred an unreasonable benefit upon the removalist by purporting to exempt it from liability for its failure to provide the contracted services to an appropriate standard, and limited the consumer's right to sue the respondent.

The ACCC has also been successful in a recent action in the Federal Court against ByteCard Pty Ltd, a business that provides internet and fixed-line telephone and web-design services: *Australian Competition and Consumer Commission v ByteCard Pty Limited* (Federal Court of Australia, Jessup J, unreported, orders made July 24, 2013). According to the ACCC, four clauses in ByteCard's standard consumer contract were declared to be unfair contract terms, including one that allowed ByteCard to exclude liability and required the customer to indemnify ByteCard in any circumstance, even where there was no breach of contract and the damage may have been caused by ByteCard.

GUIDANCE FROM CONSUMER PROTECTION AGENCIES

The 2016 Unfair Contract Terms Guide ("Guide") for business-to-consumer transactions (which was developed by Australia's consumer protection agencies, including the ACCC and ASIC) provides several relevant anonymous case studies. One such example includes an analysis of a term of entry to a car parking site that stated that the operators "shall not in any circumstances be liable for any loss or damage" to a vehicle, including where the loss or damage is caused by the operator's negligence, fundamental breach of contract, misdelivery to an unauthorized person, theft or vandalism. The term also stated that if the limitation of liability does not apply, then the operator's liability is limited to $300. In this case, the car park operators acknowledged the terms were unfair and agreed to change them accordingly.

The Guide also cites a term of a motor vehicle repairer's contract that excludes liability for fire, loss or damage to the vehicle while under the control of the repairer. This limitation of liability was also considered too broad, because it would potentially eliminate liability even if the repairer drove the vehicle negligently and damaged it. A similar "condition of entry" to a stadium in Queensland, in which entrants assumed all risk of damage, loss and personal injury (fatal and non-fatal), including as a result of negligence, was also considered to be unfair.

Although the Guide applies only to business-to-consumer transactions, the ACCC has also stated that similar provisions in relation to small business transactions would also likely be found to be unfair under the amendments. For example, a term of an agreement between a small business and a removal company that states that the removal company accepts no liability for any loss arising in the move, including loss caused by the removal company's negligence, would be likely to raise concerns because it seeks to limit the small business's rights against the removal company.

Similarly, the Guide also analyses a contract between a small business and a larger business to provide architectural services, which contains a term that indemnifies the larger business against all loss and damage arising in relation to the project, including loss or damage caused by the larger business. This term is also likely to raise concerns, because such a wide indemnity creates a significant imbalance between the rights and obligations of the parties and does not appear to be reasonably necessary to protect the larger business's legitimate interests, according to the Guide.

During the transition period under the amendments, the ACCC conducted a review of 46 standard form contracts that included limited liability and indemnity clauses, across several industries. The relevant guidance can be summarized as follows:

- **Advertising**: While not inherently unfair in advertising contracts, terms that make the advertiser liable for loss or damage caused by a publisher, or that unreasonably limit a publisher's liability, are likely to raise concerns.
- **Telecommunications**: The ACCC's review raised concerns with "broad and overreaching limited liability clauses" that sought to exclude legal rights available under the ACL.
- **Retail Leasing**: The ACCC raised concerns over indemnity clauses that appeared unreasonably broad, or indemnified landlords in circumstances where the landlord caused or contributed to the loss (including negligence).
- **Independent Contracting**: The most common clauses that are potentially in breach are clauses that require the contractor to indemnify the larger business, even in circumstances where the larger business caused or contributed to the loss or damage. This includes terms that limit liability for specific conduct, such as noncompliance with occupational health and safety or reporting obligations, or damage to third-party property.
- **Waste Management**: An example of an impermissible contract term is one that provides that the removalist would not be liable for loss or damage suffered by a small-business customer in circumstances where the removalist fails to provide services at scheduled times, or cancels or suspends the supply of those services.

CONCLUSION

Companies should be aware of this new avenue of recourse for small businesses when entering into agreements. They should ensure that they do not attempt to preclude all liability for losses and damage suffered as a result of their own conduct, including negligence, to avoid contravening the ACL.

LAWYER CONTACTS

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ENDNOTES

1 The full list of the kinds of terms in consumer contracts or small business contracts that may be unfair is contained in Section 25 of the ACL. These are:

* Terms that permit, or have the effect of permitting, one party, but not another party, to avoid or limit performance of the contract, to terminate the contract, to vary the terms of the contract, to renew or not renew the contract, to vary the upfront price payable under the contract, to unilaterally vary the characteristics of the goods or services to be supplied under the contract, to unilaterally determine whether the contract has been breached or to assign the contract to the detriment of the other party without that party's consent;
* Terms that penalise, or have the effect of penalising, one party, but not another party, for breach or termination of the contract;
* Terms that limit, or have the effect of limiting, one party's vicarious liability for its agents, one party's right to sue another party, the evidence one party can adduce in proceedings related to the contract;
* Terms that impose, or have the effect of imposing, the evidential burden on one party in proceedings related to the contract; and
* Terms prescribed by the regulations.