

ACCC Tests Extension of Unfair Contract Terms Regime to Australian Small Businesses

IN SHORT

Background: The Australian Competition and Consumer Commission is bringing its first case under the unfair contracts provisions. The provisions affect contracts with consumers and with small businesses with 20 or fewer employees.

The Effect: The results of the case will provide much-needed guidance for businesses of all sizes on the application of the unfair contracts provisions.

In November 2016, the unfair contracts regime was extended to contracts with small businesses. Our May 2016 [Alert](#) highlighted potential areas of exposure, in particular in relation to clauses seeking to limit liability, unilaterally vary prices or provide indemnity clauses. The Australian Competition and Consumer Commission ("ACCC") has now commenced proceedings in the Federal Court of Australia against defendant JJ Richards for alleged breaches of the unfair contract terms regime in the Australian Consumer Law ("ACL"). These proceedings are important for all businesses as they will be the first time that the ACCC has taken action to enforce the regime in relation to a small business contract.



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The Provisions

The relevant provisions of the ACL provide that a term in a standard form contract is unfair, and therefore void, if it:

1. Creates a significant imbalance in the parties' rights and obligations under the contract;
2. Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
3. Would cause detriment to the other party if it were to be applied or relied upon.

The unfair contract terms regime initially applied only to standard form consumer contracts; however, in late 2016, it was extended to apply to standard form contracts with small businesses entered into or renewed after November 12, 2016. "Small business contracts" are defined as contracts that meet the following criteria:

- The contract is for the supply of goods or services, or the sale or grant of an interest in land;
- At the time the contract is entered into, at least one party to the contract is a small business (i.e., a business that employs less than 20 people); and
- The upfront price payable under the contract is no more than AUD\$300,000, or AUD\$1 million if the contract is for more than 12 months.

In this case, the ACCC alleges that the following terms in the particular standard small business contract are unfair:

- A term binding customers to subsequent contracts unless they cancel the contract within 30 days before the end of the term;
- A term allowing the defendant unilaterally to increase its prices;
- A term removing any liability for the defendant where its performance is "prevented or hindered in any way";
- A term allowing the defendant to charge customers for services not rendered for reasons that are beyond the customer's control;
- A term granting the defendant exclusive rights to remove waste from a customer's premises;

- A term allowing the defendant to suspend its service but continue to charge the customer if payment is not made after seven days;
- A term creating an unlimited indemnity in favor of the defendant; and
- A term preventing customers from terminating their contracts if they have payments outstanding and entitling the defendant to continue charging customers equipment rental after the termination of the contract.

The ACCC will seek to have the contract terms declared unfair (and therefore void) and is also seeking an injunction to prevent the defendant from entering into future contracts that contain these terms.

The ACL also provides a list of terms that may be unfair, which is helpful for businesses in undertaking their own assessment of their contracts. On their face, it appears that many of the terms listed above in the defendant's contracts fall within that list and are therefore void. However, businesses should not take this list as exhaustive or definitive, and a review of their standard form contracts, having regard to the degree of "unfairness" between the parties and the overarching definition of "unfair" provided in the ACL, is advisable.

It is also possible that had defendant JJ Richards taken a more conciliatory attitude toward the ACCC's investigation, litigation (and the subsequent negative publicity) could have been avoided, in particular in respect to those terms where it is less clear whether they are unfair.

TWO KEY TAKEAWAYS

1. The unfair contracts regime originally affected only standard form contracts with consumers, but it was extended to include standard form contracts with small businesses as well.
2. Companies may want to review their contracts with small businesses for terms that may be considered unfair, while bearing in mind the degree of "unfairness" between the parties and the ACL's overarching definition of "unfair".

CONTACTS



Nicolas Taylor
Sydney



Prudence Smith
Sydney

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