

Unfair Contracts Update - are you complying with the law

From 12 November 2016 the current Unfair Contract Terms Regime (UCT Regime) has been extended to cover standard form contracts entered into with 'small business'.

The changes have a significant impact on the way Australian businesses contract with each other and it is important that you understand how the changes affect you and how you need to prepare now that the changes are effective.

As at the date of introduction Australia is the only country in the world to apply this type of stricture to business to business contracts.

Standard form small business contracts affected

The extended UCT Regime applies to any standard form small business contract for the supply of goods and services, including financial services or products or an interest in land.

The changes also apply to franchise agreements and are in addition to existing extensive compliance and regulatory obligations under the current Franchising Code of Conduct.

What is a 'small business contract'?

A contract is a small business contract where:

- at least one of the businesses employees less than 20 people; and
- the upfront price of the contract is no more than \$300,000 or \$1million if the contract length exceeds 12 months.

Even if a franchisor is a small business it is not exempted. The new UCT Regime can be used by one small business against another small business.

Although a 'standard form contract' is not defined, the UCT Regime does provide that a court may take into account matters such as whether one party has more bargaining power than the other party.

There is a presumption that a contract is a standard form contract unless it is proven to be otherwise.

When a document was prepared and whether there was any opportunity to negotiate on the terms of the contract as well as whether the contract was customised for the particular transaction are also facts that may be taken into account when determining whether the contract is a 'standard form contract'.

Negotiations in relation to price will not count as negotiations in respect of the contract for the purposes of deciding whether a standard form contract was used.

When will a term be “unfair”?

Contractual terms will be considered to be unfair if they cause a significant imbalance in the rights and obligations between the parties and where a term goes beyond what is reasonably necessary to protect a party's legitimate interests.

In addition, a contractual term will be unfair if it would cause the other party financial detriment if relied upon.

Unfair terms will be void

Any term of a small business contract that is found to be unfair will be void.

The remainder of the contract will continue to operate to the extent that it is capable of operating without the unfair term. However, the whole of a contract may be lost if the contract is incapable of being fulfilled without the unfair term.

Limited Exemptions

The new UCT Regime provides for a limited number of exemptions for terms permitted by other laws such as the Franchising Code. However, no blanket exemption has been allowed for franchise agreements.

Multiple recent publications released by the Australian Competition and Consumer Commission (ACCC) have highlighted franchise agreements as being one of the key areas to be covered by the new regime.

The changes are likely to have a significant impact and increase the considerable compliance obligations that are already placed on franchisors.

Reminder

All of our commercial and franchisor clients are reminded that you should update your standard form contracts to ensure they are compliant with the new UCT Regime.

If you or someone you know wants more information or needs help or advice, please contact us on (03) 9600 0162 or email info@lordlaw.com.au.