

## Extension of the unfair contracts regime to small businesses

The Federal Government has passed a bill extending the unfair contract term protections of the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) to the small business sector.

Under the new laws, a Court is able to declare that a term of a standard form small business contract is void if the term is unfair.

The laws are an extension of existing provisions which have been available to consumers since 1 July 2010.

The intent of the bill is to level the playing field and prevent “*take it or leave it*” standard form contracts, which are commonly one-sided, from including unfair terms. The amendments are based on the assumption that small businesses, like consumers, often lack the resources or skills to understand and negotiate contract terms and are vulnerable to the inclusion of unfair terms.

Agreements which could be caught by the provisions include retail leases, supply agreements, franchise agreements and finance contracts.

In this article, we look at what the new regime will mean for your business.

### **What transactions will be captured by the new regime?**

The amendments will extend the unfair contract term protection laws to contracts that are defined as a “*small business contract*”. A small business contract is one where:

- the contract is for the supply of goods, services or a sale or grant of an interest in land;
- at the time at which the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- the upfront price payable on the contract is no more than \$300,000 (or \$1 million if the duration of the contract is more than 12 months).

The protections only apply to standard form contracts. Although there is no express definition of a standard form contract, a standard form contract generally includes situations where:

- one party has all or most of the bargaining power relating to the transaction;
- one party prepared the contract before discussions between the parties;
- one party was required to either accept or reject the contract as presented;

- one party was not given the opportunity to negotiate; or
- the terms of the contract are not specific to one party or the particular transaction.

A contract will be presumed to be a standard form contract unless a party proves otherwise.

The regime will not only apply to new small business contracts, but also pre-existing small business contracts which are renewed and to the terms of pre-existing contracts which are varied.

### **What is an unfair contract term?**

A term of a contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (financial or otherwise) to a party if it were to be applied.

The legislation sets out some examples of unfair contract terms, including terms that:

- allow one party to unilaterally vary, renew or terminate the contract;
- penalise one party for a breach or termination of the contract;
- allow one party to vary the upfront price under the contract without the right of the other party to terminate the contract; and
- allow one party to unilaterally determine whether the contract has been breached.

### **Enforcement of the new provisions**

If a party considers that a term of a small business contract is unfair, it can apply to the Federal Court seeking a declaration that the term is void and unenforceable. The remainder of the contract will bind the parties if it is capable of operating without the unfair term. Once a term is declared unfair, the party could also seek an injunction preventing the other party from relying on the unfair term.

There are no specific penalties or offences associated with a contract term being held to be "unfair".

Applications to the Court can be made by a small business, the ACCC or by State regulators. The ACCC has been provided with \$1.4 million in funding to assist in the implementation of and compliance with the new legislation.

### **What can your business do going forward?**

The new laws will apply to contracts entered into or varied from 12 November 2016, which means that any business that uses a standard form contract when dealing with a small business will then have to comply with the new regime.

Companies which deal with small businesses should review their standard terms of trade to ensure that they do not include unfair terms. This might include:

- examining whether the company utilises standard form contracts;
- assessing the extent to which standard form contracts are entered into with businesses which employ less than 20 people and which fall within the upfront price thresholds;
- identifying existing contracts which might be renewed after the commencement of the new regime; and
- reviewing any standard form contracts to identify terms which might be deemed “unfair” and considering whether they should be amended.

## **Conclusion**

The new legislation will affect a large number of industries which rely on standard form contracts. Businesses should review their standard form contracts immediately to minimise the risk of key contractual terms being found unenforceable.

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](mailto:info@lordlaw.com.au).