

ACCC takes action to enforce new unfair contracts regime: businesses are now on notice!

In less than one year since the commencement of the unfair contracts regime on 12 November 2016, the ACCC has (in September 2017) brought legal action against two companies in relation to their standard form contracts with small businesses. The regime allows a Court to declare a term within a “small business standard form contract” to be void and unenforceable on the basis that it is unfair. This is a change in pace from the approach taken by the ACCC earlier in the year where they were working with and engaging some of the businesses to meet the required standards.

Given these recent proceedings, it is essential that all businesses using standard form contracts dealing with small businesses are aware of these rules and review their contracts to ensure compliance. Businesses that fall within the regime are on notice that the ACCC has commenced enforcement.

In our experience, many businesses have continued to use or renew old contracts or precedent contracts which may now include invalid and unenforceable terms. If a term is found to be unfair, it can be deemed void and unenforceable. This could have a significant effect on the nature of the contract and or cause significant damage to businesses, including costly legal expenses associated with litigation.

In particular, the ACCC has revealed that it will focus on prosecuting in industries which have showed an ‘indifferent or lukewarm’ response to the new laws. These industries include but are not limited to advertising services, telecommunications providers, retail leasing industry, waste management industry, franchising, independent contracting and agriculture.

Federal Court - JJ Richards & Sons Pty Ltd

The first action brought by the ACCC is against JJ Richards & Sons Pty Ltd, one of the largest waste management companies in Australia. The ACCC has alleged that a number of the terms in the standard form contract it uses when dealing with small businesses are unfair and therefore void. There are a range of terms with which the ACCC have taken issue, including:

- Unqualified indemnities in favour of JJ Richards regardless of fault;
- Qualified limitations on the Liability of JJ Richards for providing services where ‘prevented or hindered in any way’;
- A clause which demands exclusivity regardless of whether JJ Richards can provide the required service;
- Unilateral right to increase fees;
- Automatic renewal of the agreement unless cancelled by the customer;
- A clause which allows JJ Richards to continue to charge for rental of equipment after the termination of the contract;
- Ability for JJ Richards to charge for services not rendered outside of the customer’s control; and
- Ability for JJ Richards to suspend service but continue to charge the customer if payment is not made within seven days.

The ACCC is seeking to have declared as invalid a number of these terms. This case will likely provide some clarification and guidance moving forward and we will provide an update as soon as a decision is made, however, the action should also stand as a warning that the ACCC is now taking enforcement proceedings where businesses have not responded to the change in the law.

Federal Court - Servcorp Ltd

The second action is against Servcorp Ltd, which supplies office space and virtual office services to a number of small businesses. The ACCC has raised issue with five of the terms which Servcorp use in their standard form small business contracts, including:

- Allowing Servcorp to automatically renew a customer's contract and unilaterally increase the contract price after the renewal without prior notice to the customer;
- Ability for Servcorp to unilaterally terminate the contract and to impose penalty-type consequences on the customer;
- A term which unreasonably limits Servcorp's liability or which imposes unreasonable liability on the customer;
- Allowing Servcorp to unilaterally determine whether the contract has been breached; and
- Permitting Servcorp to unilaterally acquire the customer's property without any notice.

In particular, the ACCC indicated that many small businesses complained that Servcorp were automatically renewing contracts and abusing that clause by substantially increasing rents.

When does the regime apply?

The regime applies to all standard form contracts (offered on a "take it or leave it" basis without negotiation) where one party is a small business (i.e., less than 20 employees) and the upfront price payable is no more than \$300,000 (or \$1 million if the contract is for more than 12 months). It applies to all contracts which are made or renewed on or after 12 November 2016. If a contract is varied, it will apply to the varied terms. We can assist you to understand whether the regime applies to you and the implications for your business.

What kinds of terms are unfair?

What is an "unfair term" will be determined on the facts, however, for terms to be unfair they must:

- Cause a significant imbalance in the parties' rights and obligations; and
- Not be reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- Cause detriment to a small business if relied upon.

There is also some indication in the legislation of terms which may be considered unfair by a Court:

- Terms that enable one party (but not another) to avoid or limit their obligations under the contract;
- Terms that enable one party (but not another) to terminate the contract;
- Terms that penalise one party (but not another) for breaching or terminating the contract; and
- Terms that enable one party (but not another) to vary the terms of the contract.

These are only indicators of what 'unfairness' can look like and certainly do not limit what can be considered. It is important to review all provisions and terms with a contract (in context) to ascertain whether it is unfair in the circumstances.

What should businesses be doing?

All businesses which deal with small businesses using standard form contracts should have already reviewed these types of contracts to ensure that they are compliant with the new laws. If they have not, this must be a priority. If there is any concern that a term may be unfair, it is worth seeking legal advice as to whether the clause should remain, be amended / re-drafted or deleted.

Takeaways

It is clear that the ACCC is now taking action to enforce the unfair contract terms regime for standard form contracts with small business which came into effect last year.

This means that all businesses which use standard form contracts and who deal with small business are on notice and should take action as a matter of priority. If you require any assistance in understanding the regime or ensuring that your business complies, please get in touch with us.

Small businesses that are parties to these types of contracts should also be aware of their rights and seek legal advice as required to ensure that their rights are protected.

For further information, please contact Dean Katz (Partner, Corporate & Commercial) on +61 9608 2253 or by email d.katz@cornwalls.com.au. Thanks to Amy Giles and Tom Boyce who assisted Dean with this article.

If you do not wish to receive future legal updates from Cornwall Stodart, please contact us [via email](#).

Cornwall Stodart Level 10, 114 William Street, Melbourne VIC 3000, Australia
Phone +61 3 9608 2000 Fax +61 3 9608 2222 enquiry@cornwalls.com.au www.cornwalls.com.au