

All's Fair in Contracts and Law? Unfair Contract Protection for Small Business

Amendments to the Australian Securities and Investment Corporations Act 2001 and the Competition and Consumer Act 2010 to commence on 12 November 2016 will extend to small businesses protections previously only available to consumers. These relate to standard form contracts and essentially allow for challenge of unfair contract terms in such contracts. The amendments to the ASIC Act will apply primarily to financial products and services. The amendments to the Competition and Consumer Act will have much broader application and this article looks at that act and the Australian Consumer Law under that act. The key points are:

1. Whether a contract is a standard form contract will be determined by the Court, applying a number of criteria, which essentially relate to the relative bargaining positions between the parties, i.e. a contract imposed by supplier on a "take it or leave it" basis, with little or no opportunity to negotiate, will likely be a standard form contract. Further, a contract will be presumed to be a standard form contract unless the party relying on the contract proves otherwise.
2. The contract also needs to be a consumer contract or (with the new amendments) a small business contract. The extension to small business contract is significant, because the definition of consumer contract is quite limited, requiring a contract to supply to an individual for personal domestic or household purposes. In contrast, small business contract requires only that one of the parties is a business employing less than 20 persons (not including casuals, unless employed on a regular basis) and the upfront price under the contract is no more than \$300,000 or \$1 million if the contract has a duration of more than 12 months.
3. If the contract is a standard form contract and a consumer contract or small business contract, any term of the contract is void, if it is "unfair". The act sets out the criteria to be taken into account by the Court in determining whether a term is unfair and also provides a lengthy list of examples of terms which will be considered unfair. Much of this turns on the transparency of the provision (i.e. whether it was clearly presented or hidden in fine print) and whether the provision was reasonably necessary to protect the legitimate interests of the party relying on the provision. Further, a term will be presumed not reasonably necessary unless the party relying on the provision proves otherwise.
4. Whether this applies to a strata owners corporation is not entirely clear. The act defines business as including a business not conducted for profit, but does not otherwise define business. The activities of the particular owners corporation could lead to it being regarded as a business. A strata owners corporation may manage common property and funds for lot owners. It may also enter into commercial arrangements with lot owners, (e.g. provision of services) and third parties (e.g. licences to use common property). In any case, the other party to a contract with an owners corporation could be a consumer or small business, attracting these provisions. In those circumstances, pending further clarification from the

courts, it would be prudent to assume that these provisions could apply to a contracts with a strata owners corporation.

5. This impacts greatly on the approach which suppliers and customers need to take to their contracts. In particular:
 - a. Suppliers need to review their contracts and their procedures for entry into contracts or risk entering into unenforceable contracts.
 - b. Customers who have entered into contracts which they regard as unfair may have a means of challenging the contract.

Either way, we could assist you in dealing with these issues.

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31 August 2016



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