
Unfair contract terms regime extended to protect small business

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In brief

The Federal Government has introduced a Bill to Parliament that will provide small businesses with protection against unfair contract terms.

The Bill has passed the House of Representatives and is awaiting consideration by the Senate Economics Legislation Committee, which is due to report on the legislation on 14 September 2015.

Utilities, banks, insurers, online traders and other enterprises which deal with small businesses under standard form contracts should review and amend their contracts to ensure they are compliant with the unfair contract terms regime.

In detail

If the Federal Government's legislation is enacted, it will render voidable any unfair contract terms found in standard form contracts below a prescribed value which are entered into with a small business.

The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Bill) amends the Australian Securities and Investments Commission Act 2001 (ASIC Act) and the Australian Consumer Law (ACL), which is set out in the Competition and Consumer Act 2010, to extend the unfair contract term protections currently available to consumers to cover businesses with less than 20 employees. The extended regime applies to standard form contracts entered into with a small business which are valued at less than the prescribed transaction value.

The unfair contract terms regime will protect against unfair terms in a small business contract, which is defined to be a standard form contract the upfront price of which does not exceed either \$100,000, or \$250,000 if its duration is more than 12 months.

The regime utilises the same concepts of 'unfair' and 'standard form contract' as have been adopted in the unfair contract terms regime presently operating in favour of consumers. A 'standard form contract' is generally that which is prepared by one party to a contract who has all or most of the bargaining power,

the terms of which are standardised and requires the other party to either accept or reject the terms without an opportunity to negotiate.

A term would be considered ‘unfair’ if it:

- causes a significant imbalance in the parties’ rights and obligations 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 (whether financial or otherwise) to a party if it were to be relied on.

A Court may declare a term of a small business contract to be unfair and therefore void on application to Court by either a party to the contract, or the relevant regulator (ACCC or ASIC). Such a contract will continue to bind the parties if it can operate without the unfair term.

The Bill will:

- extend the consumer unfair contract term protections in the ASIC Act and the ACL to small business contracts that meet the prescribed criteria, and
- make provision for exempting small business contracts that are subject to prescribed laws that are deemed equivalent to the unfair contract term protections in the ASIC Act or the ACL, such as the Franchise Code of Conduct, which is a mandatory code.

The Bill was tabled in the Senate and has been referred to the Senate Economics Legislation Committee, which is due to report on the legislation on 14 September 2015. Once enacted by Federal Parliament, the legislation will commence six months after the date it receives Royal Assent.

The ASIC Act and the ACL currently contain an unfair contract term regime in favour of consumers. The ASIC Act’s requirements apply to financial services and products and the ACL applies to the supply of goods or services other than financial services or products and the sale or grant of an interest in land.

The unfair contract terms regime will not apply to constitutions of a company, managed investment scheme or other kind of body.

In addition, regulations may be promulgated to exempt from the regime certain small business contracts to which a prescribed law of the Commonwealth, State or Territory applies where the Commonwealth Minister is satisfied that the law provides enforceable protections for small business that are equivalent to the protections provided under the unfair contract terms regime, taking into account:

- any detriment to businesses of that kind resulting from prescribing the law,
- the impact of business generally resulting from prescribing the law, and
- the public interest.

The takeaway

The extension of the unfair contract terms regime will have a direct impact upon those businesses that use standard form contracts valued less than the prescribed transaction value threshold when undertaking commercial transactions with any business with less than 20 employees.

This will apply to most large companies who use standard form contracts to acquire goods or services from small businesses or who supply goods or services to small businesses.

The legislation will apply to standard form business contracts that are entered into or renewed/varied after the commencement date.

Enterprises who use hardcopy or online standard form contracts when dealing with small businesses should arrange to have those standard form contracts reviewed against the statutory criteria for unfairness to identify those contractual terms which are susceptible to be declared void if challenged.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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