

Enhancing Protection for Small Businesses: Proposed Reforms to Unfair Contract Term Provisions under the Australian Consumer Law

24 November 2020

On 9 November 2020, the Commonwealth Treasury announced that Federal and State and Territory consumer affairs ministers had agreed to reform the existing unfair contract term protections under the Australian Consumer Law (ACL).¹ If passed, these reforms will expand the application of the unfair contract term protections to a greater number of small businesses and will offer clearer guidance on when the protections apply. Most notably, these reforms will have the effect of making unfair contract terms unlawful, meaning that courts will be able to impose civil penalties for contraventions of these provisions.

Proposed Reforms

The unfair contract term protections, which apply to standard form consumer and small business contracts, seek to address contract terms that create a significant imbalance in parties' rights or obligations.² Having regard to stakeholder feedback received during the recent consultation, the Commonwealth and State and Territory governments have indicated the following key reforms to the protections.

Make Unfair Contract Terms Unlawful

Currently, the law technically does not prohibit the use of unfair contract terms, but instead allows courts to declare unfair terms as unlawful and void. As potentially the most significant reform, it has been proposed that unfair contract terms be made unlawful and that courts be given the power to impose civil penalties in relation to these terms. It is recommended that consumers also retain the right to challenge unfair contract terms in court and have them rendered void.³

Courts would be able to determine the appropriate penalty up to a maximum amount as prescribed by law. Before a civil penalty could be imposed, the court would need to be satisfied that imposing the penalty was appropriate in the circumstances of each individual case. It is expected that such a change will be more likely to deter contract-issuing parties from including unfair contract terms in their standard form contracts.

Flexible Remedies

As noted by stakeholders, there is the potential currently that, if an unfair contract term is challenged and declared void, small businesses may be put into a worse situation than if the term were to remain. As such, the proposal that courts be given the flexibility to order appropriate remedies received strong support from both stakeholders and regulators. In particular, the Australian Securities and Investment Commission (ASIC) noted in its submission that removing the automatic voiding of unfair contract terms may promote the fairness objective of the unfair contract term provisions and may allow courts to tailor remedies for the needs and circumstances of each business on a case by case basis.⁴

An alternative option which received general stakeholder support was amending the law to create a rebuttable presumption that a contract term is unfair if in a separate case the same or a substantially similar

¹ Australian Government Treasury, 'Enhancements to Unfair Contract Term Protections' (9 November 2020) <<https://treasury.gov.au/publication/p2020-125938>>.

² In October 2020, we gave a presentation about what constitutes an "unfair contract term" under the ACL at a Direct Selling Australia webinar. A copy of our presentation is available [here](#).

³ Australian Government Treasury, 'Enhancements to Unfair Contract Term Protections: Regulation Impact Statement for Decision' (RIS) (September 2020) <<https://treasury.gov.au/sites/default/files/2020-11/p2020-125938-ris.pdf>>.

⁴ RIS Pages 54-55.

term has been used by the same entity or in the same industry and has been declared by a court to be unfair. In other words, if a term has been declared by a court to be unfair, a business who seeks to use the same term in similar circumstances bears the onus of proving that the term is not unfair.⁵

Definition of “Small Business Contract”

Submissions were generally unresponsive of retaining the existing 20 employee threshold for defining a “small business”. This is because small businesses, such as those in the hospitality industry during busy seasons, may often employ more than 20 persons, and the 20 person headcount may be inconsistent with other commonly-used definitions of “small business”.⁶

The most favoured option by stakeholders was replacing the 20 employee threshold with a 100 employee threshold or a \$10 million annual turnover threshold. If accepted, as long as at least one party to the contract meets either of these requirements, a standard form small business contract would be covered by the unfair contract term protections.⁷

In relation to the contract value threshold, the most supported option was to remove the threshold entirely. This is on the basis that, as submitted by ASIC, where a small business has no opportunity to negotiate standard form contracts, the unfair contract term protections are necessary and appropriate regardless of contract value.⁸

Clarity on “Standard Form Contract”

The reforms also seek to address the question of what constitutes a “standard form contract”. To assist in clarifying this term, the reforms propose to require courts to consider factors such as “repeat usage” – in other words, evidence that a substantially similar contract has been used by a contract issuer in a number of transactions would support a finding that the contract is a standard form contract.⁹ A further proposed option to assist in clarifying what constitutes a standard form contract is to amend the law to clarify the types of situations where a party has not had an “effective opportunity to negotiate”.¹⁰

Minimum Standard Exemption

Under the current protections, terms which are required or expressly permitted to be included in contracts under Commonwealth, State or Territory law are exempt from the application of the unfair contract term protections.¹¹ However, some laws require that, if certain “headline” clauses are included in a contract, additional terms which set industry-specific requirements must also be included. The reforms propose to extend unfair contract term exemptions to these types of “headline” terms.

For instance, State and Territory retail lease legislation currently provides that, if a demolition clause is included in a lease agreement, certain requirements relating to the demolition must also be included. The current protections would exempt the latter clauses, but not the headline demolition clause. The new reforms propose to exempt these “headline” clauses from the application of the unfair contract term protections, but only to the extent that they also include minimum standards or industry-specific requirements as required under legislation.¹²

⁵ RIS Page 56.

⁶ RIS Pages 58-59.

⁷ RIS Page 60.

⁸ RIS Page 66.

⁹ RIS Page 68.

¹⁰ RIS Pages 7, 68.

¹¹ ACL section 26(1)(c).

¹² RIS Pages 69-70.

What next?

The Commonwealth Treasury will now develop and release for comment draft legislation incorporating these proposed reforms. This will provide stakeholders with a further opportunity to comment on the amendments. For more information on the unfair contract term protections, including whether they would be likely to apply to your contract or may impact on you or your business, please contact the Addisons team.

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