

## Extension Of Consumer Protection Laws To Benefit Small Businesses (standard forms of Contract)

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On 12 November 2016, the Australian Consumer Law ("ACL") will be amended to extend the protections given to consumers there, to small businesses.

It will apply to standard form contracts entered into on or after 12 November 2016 and also to standard form contracts which are renewed or varied after that date.

### What does the ACL catch?

Section 23 of the ACL makes part of a consumer and now also a small business contract void if:

- The part is unfair; and
- The contract is a standard form contract.

A small business contract is one:

- for a supply of goods or services or a sale or grant of an interest in land, and
- **in which at least one party to the contract** is a small business.

### What is a small business?

A "small business" will be one which, at the time the business is entering into the contract (or its variation or extension)

- employs less than 20 people; and
- is a party to a standard form contract in which either:
  - the upfront price payable under the contract does not exceed \$300,000; or
  - the contract is for more than 12 months and the upfront price payable does not exceed \$1,000,000.

### Counting the number of employees

When counting the number of employees it seems that the actual numbers of the people are to be counted. Thus, if two people are job sharing, one working in the position for 3 days per week and the other two, they will count as two people. However, casual employees may be disregarded if they are not employed on a regular and systematic basis.

### **At least one party must be a small business**

Section 23 of the ACL literally provides that “at least one party to the contract is a small business”.

Taken literally, that could produce the odd result that the party producing the standard form contract might be a small business but the client might not be a small business, yet the larger client could take advantage of the small business protections. For example, if the supplier producing and seeking to rely upon its own standard form contract had only 19 full time employees, no people job sharing and no part time employees, it would be a small business, at least for the purposes of the ACL. If it was supplying services to a larger business, for example, one employing 50 or more employees (“the client”), the client could be able to reap the benefits of the ACL. That result could hardly be intended by legislation intended to protect, initially consumers, and subsequently, small business, compelled to accept standard form contracts usually produced by large enterprises.

A court may in the future therefore interpret section 23 as applying to all parties to the contract except for the party which actually produced the standard form contract.

### **What does “upfront price” mean**

The phrase “upfront price” used in the ACL is a curious one but in simple terms is defined by section 26(2) to mean:

“the consideration that;

- (a) is provided or is to be provided, for the supply, sale or grant under the contract; and
- (b) is disclosed at or before the time the contract is entered into,
- (c) but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.”

### **Contracts existing before 12 November 2016**

Contracts entered into before 12 November 2016 are not caught by the ACL.

However, if a contract is renewed on or after 12 November 2016, the ACL catches the conduct occurring after that date. Apparently, the renewed contract itself will not be caught.

Furthermore, however, if a term of the contract which existed before 12 November 2016 is varied on or after 12 November 2016, the varied term may be caught, at least to the extent that it relates to conduct that occurs on or after the date when the variation takes effect.

### **A wide scope of services are caught**

Importantly, “services” is defined widely in section 2 of the ACL as including:

- “ (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
- (b) without limiting paragraph (a) the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
  - (i) a contract for or in relation to the performance of work (including work of a professional nature) whether with or without a supply of goods; or
  - (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
  - (iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar extraction; or
  - (iv) a contract of insurance; or

- (v) a contract between a banker and a customer of the banker entered into in the course of a carrying on by the bank or of the business of banking; or
- (vi) any contract for or in relation to the lending of money;

but does not include rights or benefits being the supply of goods or the performance of work under a contract for service.”

### **The meaning of “unfair”**

Section 24 of the Act sets out the meaning of “unfair”. The term of the contract is unfair if it would cause a significant imbalance in the parties’ rights and obligations, was not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the relevant term and whether it would cause detriment to a party if relied on. One factor the court must consider is whether the term is transparent. Considerations of whether or not it is transparent can include it being expressed (or not) in reasonably plain language, legibly and presented clearly.

Section 25 gives some examples of what could be unfair, such as:

- a term that permits, or has the effect of permitting one party, but not the other party, to terminate the contract;
- a term that penalises, or has the effect of penalising, one party but not another party for a breach or termination of the contract;
- a term that permits, or has the effect of permitting one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that limits or has the effect of limiting, one party’s rights to sue another party; and
- a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract.

### **What is a standard form contract?**

A court is not restricted in what it can take into account in determining whether or not a contract is a standard form contract. However, Section 27(2) sets out a number of matters which the Court must take into account, namely:

- (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
- (b) whether the contract was prepared by one party before any discussion relating to the transaction that occurred between the parties;
- (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in Section 26(1)) [see below] in the form which they were presented;
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in Section 26(1);
- (e) whether they terms of the contract (other than the terms referred to in Section 26(1) take into account the specific characteristics of another party or the particular transaction;
- (f) any other matter prescribed by the regulations.”

Section 26(1) provides that the term of a contract is not void to the extent that the term:

- defines the main subject matter of the contract; or
- sets the upfront price payable under the contract; or
- is a term required or expressly permitted by a law of the Commonwealth, a State or a Territory.

### **How much of the contract is affected?**

Importantly, it is only the unfair term which is void and in effect therefore omitted from the contract. The rest of the contract is left intact.

### **Onus of proof**

Importantly, for small businesses that may be hurt by some terms in a consumer contract, the onus of satisfying the Court that the term is fair may fall onto the supplier who has drafted the contract to be attacked.

### **Exceptions**

The following terms of the contract are exempt from the protections of the ACL:

- defining the main subject matter of the contract; or
- set the up front price; or
- is required or permitted by a law of the Commonwealth, a State or a Territory; or
- some Maritime contracts.

### **More information**

See the ACCC website at <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>

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