

How the new Unfair Contract Terms laws affect your small business

By Russell Morley, IRDI Legal (August 2016)

From **12 November 2016**, **unfair terms** appearing in standard form contracts which involve small businesses **may be void** and **cannot be relied on**.

Through amendments to the Australian Consumer Law (**ACL**), the protection currently afforded to consumer contracts will be extended to small business contracts entered into, renewed or amended (to the extent of the amendments) after 12 November 2016. From that date, a term of a small business contract will be void if the term is **unfair** and the contract is a **standard form contract**.

A **standard form contract** is:

- a contract related to the supply of goods or services, or sale or grant of an interest in land;
- which is entered into with a **small business** - being a business with less than 20 employees); **and**
- which has a **contract price** of up to \$300,000 - or up to \$1 million where the duration of the contract is more than 12 months.

Standard form contracts are essentially those which are presented by one party on a 'take it or leave it' basis and with no room for the other party to negotiate the terms. If challenged, it is up to the party which prepared the contract to prove that it is not a standard form contract, and a court will take into account factors such as whether:

- one party has all or most of the bargaining power;
- the contract was prepared by one party prior to any discussions regarding the transaction; and
- there was a real opportunity to negotiate the terms and take into account particular characteristics of the other party and/or the transaction itself.

'**Unfair term**' is not specifically defined, but the amended ACL sets out examples of contract terms that may be unfair, such as terms that enable one party (but not another) to:

- avoid or limit their obligations under the contract;
- terminate the contract;
- vary the terms of the contract; or
- penalise that other party for breaching or terminating the contract.

A contract term will generally be unfair if it:

- 1 creates a significant imbalance in the parties rights and obligations under the contract;
- 2 is not reasonably necessary to protect the legitimate interests of the party benefitted by the term; **and**
- 3 would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon.

The new laws will apply to a wide range of common contracts such as building contracts, retail leases, consultancy agreements, service agreements, supply agreements, equipment rental agreements, software licences, finance contracts and franchise agreements. Some common clauses that may be of concern (depending on the particular circumstances) are:

- liquidated (agreed) damages – with a cap on one parties' liability or unreasonable indemnity/claim procedures;
- termination without cause or with early termination fees;
- bars on claims – with unreasonable time frames or notice procedures;
- automatic rollovers eg of fixed term leases;
- one party being able to make key decisions/modifications 'in its absolute discretion' eg variations to scope;
- unreasonable litigation/ arbitration process requirements.

Either a party to the contract, the ACCC or ASIC can apply to a court to have a term declared unfair. In deciding whether a term is unfair, a court must consider the contract as a whole as well as the extent to which the term is transparent (ie, presented in plain language and not hidden in the contract). A term declared 'unfair' is void – but the rest of the contract continues if it is capable of operating without the term. This could result in a business being faced:

- without a remedy;
- with a claim for damages; and/or
- with a damaged reputation.

Certain contracts (eg insurance contracts) and specific contract terms (eg that define the main subject of the contract or set the 'upfront price payable') are excluded from the new laws. Despite objections, franchise agreements are **not** exempt and the Australian Competition and Consumer Commission has stated that this industry (as well as retail leasing and independent contracting) will be the focus on its education and compliance resources in the lead up and following implementation of the new laws.

How can I find out more?

At IRDI Legal, our experienced and specialised **Commercial team** can assist you in ensuring compliance with these new requirements by:

- Providing advice as to how the new laws affect your particular business and future negotiations with third parties;
- Reviewing existing standard form documentation so that any necessary amendments can be made **before** the new law takes effect on 12 November 2016; and
- Preparing future documentation which complies with the new laws in light of your particular circumstances and requirements.

Please contact Russell Morley at russell.morley@irdi.com.au or (08) 9443 2544 to find out more.