

MemberUpdate

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TOPIC: *Unfair Contract Terms for Small Business*

DISTRIBUTION: *GTA Members – primary contact list. Please circulate to all appropriate internal parties.*

Background

Australian unfair contract laws relevant to consumers will be extended to include small businesses as of 12 November 2016.

In light of the upcoming legislative changes, GTA have reviewed each of the relevant GTA contracts and the GTA Trade Rules to ensure necessary changes, if any, are made.

A significant number of growers and other small businesses will be captured by the definition of a small business under the new laws.

Our review found that no changes are required to the GTA contracts and GTA Trade Rules, however members who use standard form contracts may wish to consider reviewing their documents and processes.

Unfair contract law

What is new?

Unfair contract laws are provided for in Australia under Australian Consumer Law (*Competition and Consumer Act 2010*) (**ACL**) for goods and services and under the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) for financial products and services.

Presently, the laws only apply to consumers purchasing goods or services for personal use (not for business use), however the legislature has recognised that small businesses may also be compromised when agreeing to contract terms with larger businesses. Therefore, commencing **12 November 2016**, small businesses who meet the following criteria will also be protected by the current unfair contract laws in the ACL and ASIC Act:

1. employ fewer than 20 employees; and
2. either:
 - (a) the upfront payable price under the contract is less than \$300,000 in a single year; or
 - (b) the contract has a duration of more than 12 months and the price payable is less than \$1,000,000.

Which contracts apply?

Relevant contracts are those that:

1. are for the supply of goods or services;
2. contain a term that is unfair; and
3. are in a standard form contract.

Supply of goods or services

The supply of grain or oilseeds falls under this test, so long as the contract value of \$300,000 or \$1,000,000 as relevant (see above) is not exceeded.

Contracts that relate to the provision of financial products or services may be captured under the ASIC Act.

An unfair term

A term is unfair if:

1. the term would cause a significant imbalance between the parties rights and obligations;
2. it is not reasonably necessary to protect commercial business interests of the beneficial party; and
3. it would cause detriment to the small business.

A standard form contract

A standard form contract is not merely a contract that requires a party to complete pre-filled details on a form. A standard form contract generally contains the following elements (however a contract is presumed to be standard form unless proved otherwise):

- 1 there is a lack of bargaining power of the small business;
- 2 the opportunity of the small business to negotiate the terms of the contract is minimal;
- 3 the larger business prepared the contract before any discussions with the small business; or
- 4 the small business was required to accept or reject the terms of the contract before a discussion.

What is an example of an unfair term?

A small business contract must not include terms that:

- 1 allow one party (but not another) to avoid or limit their obligations;
- 2 allow one party (but not the other) to terminate the contract;
- 3 penalise one party (but not another) for breaching or terminating the contract; or
- 4 allow one party (but not another) to vary the terms of the contract.

Do we need to review all of our contracts?

The below contracts are exempt from the unfair contract laws;

- 1 charter party of a ship;
- 2 contract for the carriage of goods by ship; or
- 3 small business contracts that are covered by an industry specific law (such as the *Independent Contractors Act 2006* (Cth)).

Other industry contracts

If a member amends the GTA contracts or utilises their own standard form contracts, they will need to carefully consider if any supply contracts with small businesses contain unfair terms.

“Click-through” contracts

There is an increasing trend in the industry for growers to contract with buyers via “click through” contracts, where there is limited or no negotiation and the grower accepts all the terms provided on a website or app.

Members should ensure that these contracts do not contain any unfair terms and that all terms are readily available to the smaller contracting party.

Financial products and services

The offering of financial products and service contracts to growers may also require review, as the ASIC Act incorporates the same test of unfairness, taking particular care to ensure that all terms are transparent and easily understood. The terms must be expressed in plain language, presented clearly and made readily available to the small business.

GTA Arbitration

GTA have also reviewed the incorporation of the GTA Dispute Resolution Rules into the GTA contracts and have formed the opinion that the incorporation of these terms do not favour one party over another.

Consequences for using an unfair term

If a term is determined by a court to be unfair, it will be declared void and unenforceable, however remainder of the contract will remain on foot.

The disadvantaged party can apply for an injunction to prevent the larger party from relying on the unfair term. Further, they could also seek compensation from the larger party if the unfair term is applied.

Recommendations

Before 12 November 2016:

- 1 ensure your due diligence process identifies when you are entering into a contract with a small business;
- 2 review your domestic contracts to ensure that you do not rely on any unfair terms; and
- 3 take particular care to ensure that all terms contained in online “click-through” contracts are readily accessible by the other contracting party and are clearly specified.

This member update has been prepared from information supplied by Holding Redlich. Members should seek their own independent advice.