

UNFAIR CONTRACT TERMS IN SMALL BUSINESS CONTRACTS: ACCC TAKES ITS FIRST COURT ACTION AGAINST JJ RICHARDS

Date: 14 September 2017

By: Ayman Guirguis, Jessica Mandla

IN BRIEF

- On 6 September 2017, the Australian Competition and Consumer Commission (**ACCC**) commenced proceedings against JJ Richards & Sons Pty Ltd (**JJ Richards**), one of Australia's largest privately-owned waste management companies.
- The unfair contract term regime was extended to small business contracts on 12 November 2016 and the ACCC has been vocal about its willingness to take enforcement action in this space.
- The proceedings against JJ Richards are the first of its kind in Australia and will see the courts set a useful precedent as to the kind of contract terms that are considered to be unfair and subsequently void.
- The ACCC is in the process of actively engaging with large businesses that it considers may have terms that are potentially unfair in their contracts with small businesses. Businesses should familiarise themselves with the ACCC's preliminary view of what constitutes unfair contract terms and take steps to ensure they are not on the ACCC's radar.
- Some recent guidance was released by the ACCC in the form of the 14th edition of the biannual *Small Business in Focus* report, released in July 2017.
- The case studies detailed in the report provide useful insights into the types of terms that may be considered likely to be unfair by the ACCC.
- In such circumstances, businesses should familiarise themselves with the types of clauses the ACCC considers likely to be unfair and review the terms of their agreements to ensure that they are compliant with the unfair contract terms regime.

Staying true to its promise to prioritise the enforcement of unfair contract terms announced in the *2017 ACCC Compliance and Enforcement Policy*, the ACCC has commenced its first proceedings in the Federal Court (the Court) alleging that JJ Richards' standard terms in its contracts with small businesses are unfair.

While this may be the first time the ACCC has resorted to court action, a recent report released by the ACCC evidences other engagements that the ACCC has had with large businesses in relation to their contractual dealings with small businesses. The 14th edition of the ACCC's biannual *Small Business in Focus* report for the period of January to June 2017 (**Report**) flags unfair contract terms in small business contracts as a key area of

concern for the ACCC and details a number of instances where the ACCC has "engaged" with large companies who have subsequently amended their standard contracts.

This *Legal Insight* will focus on the issue of unfair contracts in small business contracts and provide some practical guidance for businesses to ensure compliance with these recent legal developments.

UNFAIR CONTRACT TERMS – SMALL BUSINESS CONTRACTS

On 12 November 2016, the existing unfair contract terms protections for consumers found in the Australian Consumer Law (**ACL**) were extended to small businesses.

The unfair contract terms regime applies to standard form small businesses contracts where:

- the contract is entered into or renewed on or after 12 November 2016
- the contract is for the supply of goods and services, or a sale or a grant of an interest in land
- at the time the contract is entered into, one party to the contract is a business that employs fewer than 20 people (including casual employees)
- either the upfront price payable under the contract:
 - o is \$300,000 or less, or
 - o \$1 million or less where the duration of the contract is greater than 12 months.

Ultimately, only a court or tribunal (not the ACCC) may decide whether a term is unfair and render the term void.

The ACCC's case against JJ Richards is significant as it will provide a court's view for the first time on the types of small business contract terms that are deemed to be unfair. Until this clarity is provided by way of a court judgment, businesses should familiarise themselves with the ACCC's view of what constitutes unfair contract terms and take steps to ensure they are not on the ACCC's radar.

JJ RICHARDS

The Court documents in the proceedings against JJ Richards provide a valuable insight into the ACCC's view on unfair contract terms. The ACCC is seeking a declaration that the following eight clauses in JJ Richards' small business contracts are void and unenforceable:

1. *Automatic renewal* – binding the customer to a subsequent five year contract term if the contract is not cancelled within 30 days of the expiry of the initial or subsequent term.
2. *Price variation* – allowing JJ Richards to unilaterally increase the prices of services.
3. *Agreed times* - removing liability for JJ Richards where the performance of services has been prevented or hindered, even where the customer is not in any way responsible for the prevention or hindrance.
4. *No credit without notification* – allowing JJ Richards to charge customers for services it has not rendered for reasons that are or may be beyond the customer's control.
5. *Exclusivity* – requiring customers to obtain all waste management services from JJ Richards (notwithstanding that there is a limited "Competitive Pricing" clause in the agreement).

6. *Credit terms* – allowing JJ Richards to suspend a customer's account if payment is not received within 7 days. The customer can continue to be charged whilst services are suspended.
7. *Indemnity* - creating an unlimited indemnity in favour of JJ Richards, even where the loss incurred by JJ Richards is not the fault of the customer.
8. *Termination* - preventing JJ Richards' customers from terminating their contracts if they have payments outstanding and entitling JJ Richards to continue charging customers equipment rental after the termination of the contract, despite the fact that no services are provided.

Some of these clauses, in our view, need only limited amendment to remove the potential "significant imbalance" that the clauses are alleged to create. It will be interesting to view the approach taken by the Court, particularly about the cumulative effect of the clauses and the consideration of the contract as a whole in coming to a judgment about whether each of the clauses may be "unfair" under the ACL.

THE REPORT

The Report also provides useful insights into the types of terms that may be considered by the ACCC to be unfair and includes the following examples of companies amending contract terms to comply with the new law:

Uber (termination by one party without cause)

Uber amended its standard Driver Agreement that previously allowed Uber to terminate the agreement "without cause". The amended clause now limits Uber's right to terminate to certain circumstances including where acting reasonably in order to protect its legitimate interests.

The ACCC has previously flagged terms that enable one party and not the other to terminate the contract as being potentially unfair. This concern is likely to be heightened where a party can terminate without cause or without prior notice to the other party.

Sensis (automatic renewal terms)

Following an ACCC investigation initiated by a number of complaints by small businesses, the ACCC accepted a court enforceable undertaking from Sensis Pty Ltd (**Sensis**) in May 2017 relating to its contractual automatic renewal and cancellation processes. Sensis provides advertising and marketing services to businesses in Australia under brands including the Yellow Pages and White Pages.

According to the undertaking, from at least January 2015 to August 2016, Sensis represented on its website that its Yellow Pages and White Pages bundled print directory and online packages had a monthly fee with a 12-month minimum contract period, but failed to adequately disclose that:

- these bundled packages automatically renewed for a further 12 months unless cancelled by the customer
- the customer may be charged a cancellation fee equal to the remaining cost of the contract if they cancelled an automatically renewed contract after a certain date.

To address the ACCC's concerns, Sensis agreed to amend its Product Contract Terms to:

- make its automatic renewal terms more transparent and to include an obligation on Sensis to remind customers of the pending automatic renewal of their contracts

- qualify Sensis' right to terminate a customer's contract to circumstances where Sensis is "acting reasonably" and in order to protect its legitimate interests.

While automatic renewal terms are often essential for business continuity, the ACCC's investigation into Sensis highlights that concerns may be raised where the term is not sufficiently transparent, an extensive period of prior notice is required to terminate, and/or fees are required to be paid by the party wishing to terminate early.

In terms of transparency, the ACCC has previously indicated its view that a term being sufficiently prominent (for example, on a front page) will not always be enough. A transparent term must also be expressed in plain language rather than complex technical or legal language, be legible and presented clearly.

Fairfax Media (right to not perform contractual obligations)

Fairfax Media amended a term in its Advertising Contract that allowed it to refuse or withdraw a customer's advertisement for any reason at any time. The amended term is now limited to certain situations, for example where advertising may be illegal, defamatory or obscene.

Terms that grant one party the right to not perform either part or all of its obligations for any reason or without cause are clearly at a high risk of investigation by the ACCC. While such clauses will be dependent on the context of the agreement, there is always a presumption that parties rely on each other to perform their contractual obligations and therefore detriment will be caused where one party does not fulfil its obligations.

A business should ask itself: what interests am I trying to protect by including this clause? In the case of Fairfax, it is clear that it has a legitimate business interest in protecting itself from displaying material that would breach the law or moral standards. A party's right to non-performance or variation of its contractual obligations is more likely to be seen as a fair when it is limited to circumstances where a party can justify it as being reasonably necessary to protect its legitimate interests.

Jetts Fitness (restraint of trade)

Jetts Fitness amended the restraint of trade clause in its Franchise Agreement. The amendment reduced the wide-ranging restraint by both the period and geographical range.

Restraint of trade clauses are a notoriously common source of contractual disputes. While courts are yet to consider such clauses in the context of the unfair contract terms provisions of the ACL, it is likely that a court would apply a similar standard to what has traditionally been applied in contractual disputes. At common law, a restraint of trade clause is void unless it is reasonable and operates to protect legitimate interests. Given the imbalance of power that is likely to exist in contracts with consumers or small businesses, a court may be inclined to take an even narrower view of what is reasonably necessary to protect a larger company's legitimate interests.

NEXT STEPS FOR BUSINESSES

While the Court will ultimately provide guidance about the ACCC's approach to date regarding unfair contract terms, from a risk management perspective, all companies dealing with small businesses should review the terms of their agreements to ensure that they are compliant with the unfair contract terms regime. In particular, businesses should:

- 1 Consider the types of terms referred to above, particularly those terms providing a right to the (larger) party to . unilaterally vary terms (such a pricing and those allowing the party to avoid or limit their obligations),

automatically "rollover" the contract, or that provide for broad indemnities.

² As part of assessing the risks of such terms under the unfair contract regime, consider:

- the extent to which you actually seek to rely on the term as part of your engagement with small business (this will be relevant to the legitimate business interests you may be seeking to protect - referred to further below)
- whether the term has been the subject of disputes and complaints with your small business counterparties (and hence whether it may be the subject of complaints to the ACCC or Industry Ombudsmen). This may also provide you with a guide as to whether the term may cause a significant imbalance in the parties' rights and whether it is or is likely to cause detriment (e.g. financial detriment or delay) to the small business if relied upon
- whether the effect of any potentially unfair term is negated once the totality of rights of the small business in the contract as a whole is considered - such as the small business' ability to terminate with reasonable notice.

³ If potentially unfair terms are identified, consider again business interests the term is in place to protect, whether it does no more than protect these interests and whether it would be commercially palatable to amend/limit the breadth of the term.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.