WHO'S THE FAIREST OF THEM ALL? GOVERNMENT AND OPPOSITION BATTLE OVER SMALL BUSINESS CONTRACT PROTECTIONS

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Antitrust, Competition & Trade Regulation Alert

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ACCC Chair, Rod Sims has recently argued the present remedies that apply against Unfair Contract Terms are inadequate to deter businesses from including such terms in standard contracts with small businesses. Each of the Government and opposition have responded to the concerns with proposed reforms, including:

- making it an offence to include unfair contract terms with penalties up to AUD10 million
- potentially increasing the definition of a "small business" from the present, being a business that employs less than 20 persons to one employing less than 100 or has a turnover of less than AUD10 million
- potentially increasing the monetary threshold from the present, being that the regime only applies to contracts valued at AUD300,000 or less (or AUD1 million or less if they are for a term of more than 12 months) to AUD1 million and AUD5 million respectively, or potentially, removing the monetary threshold altogether.

Given the similar approaches, one or other proposal will be passed in the next Parliament and businesses will need to yet again examine their contract terms - this time potentially for a larger set of contracts to ensure that they comply with the Unfair Contract Terms Regime.

On 28 March 2019, the Government announced its plans to consult further on strengthening the Australian Consumer Law regime on unfair contract terms protections for small businesses.

In January 2019, the Opposition announced its own plans.

An "unfair" contract term is a term of a standard form contract that causes a significant imbalance in the parties' rights, but is not reasonably necessary to protect a legitimate interest of the party imposing the term and causes a detriment to the weaker party.

Common examples include those that allow one party - but not the other - to avoid or limit its obligations, or terminate or vary the contract without agreement. They also include terms imposing a penalty on one party for breaching or terminating a contract.

Unfair terms can be declared void if in contracts with consumers or small businesses (those that employ less than 20 people for contracts less than AUD300,000 or AUD1 million over 12 months). However, there is no prohibition,

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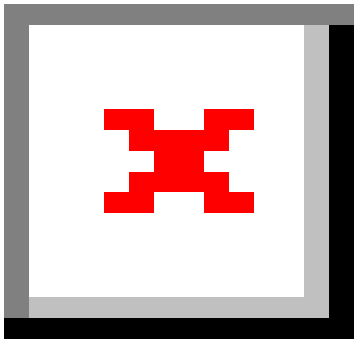
and no penalties for businesses which include unfair terms in their contracts.

The ACCC Chair, Rod Sims has argued strongly that such limited remedies are inadequate to deter businesses from including unfair terms in standard contracts. Mr Sims has argued for reforms which made unfair contract terms illegal, enabling the ACCC to seek penalties when an unfair term is declared void and issue infringement notices for contract terms that are likely to be unfair. The removal of unfair contract terms in small business contracts and contracts with consumers is a key enforcement priority of the ACCC.

The ACCC has already succeeded in convincing the Parliament to amend the *Competition and Consumer Act* (CCA) to give the ACCC the ability to compel businesses, by way of notices under s155 of the CCA, to provide information and documents relevant to any investigation into unfair contract terms.1

Both the Government and the Opposition have heard the ACCC's pleas. While the Government has as yet committed only to consulting on proposed changes to the unfair contracts regime, the options are far-ranging and demonstrate a willingness to match or even go beyond the Opposition's policies.

The critical elements of the Government and Opposition proposals for reform are summarised below.



Consultation after the election is likely. Regardless of which party wins government, the announcements demonstrate strong bipartisan support for fundamental reform of the unfair contract terms regime. As can be seen from the table, the proposals largely overlap.

It is worth noting the Opposition has also announced a policy to increase penalties generally in the CCA to a

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maximum of AUD50million or up to 30% of annual sales of relevant turnover multiplied by the number of years the infringement took place.

Businesses should carefully review their agreements to assess whether they would now be subject to, or potentially fall foul of, a future much-expanded and significantly more punitive unfair contracts term regime. The new penalties would also apply to contracts with consumers.

Experience from past reforms to the consumer laws have shown that costs can be reduced by starting compliance reviews early (even before final legislation is released) so that any contract renewal periods, negotiations and internal approvals can be considered.

[1] Ordinarily, the ACCC may only serve a notice under s155 of the CCA where a person can furnish information about conduct that may be likely to breach the CCA. The ACCC now has this power in respect of unfair contract terms even though having such a term does not breach the CCA.

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