

CDI Lawyers Update

Construction, Development & Infrastructure

Unfair Contract Terms – What’s fair in love and war?

From 12 November 2016, the prohibition against unfair contract terms will apply to standard form contracts where one party is a small business.

If you enter into agreements with contractors and suppliers that are small businesses, you should review your contracts now. Failure to do so may result in your contracts being unenforceable.

What is a small business?

A small business is a business which employs fewer than 20 people.

What is a standard form contract?

A contract will be considered a standard form contract for the purposes of the Australian Consumer Law (ACL) where:

-) the contracting party prepared the contract; and
-) the contracted party (i.e. the small business) had little or no opportunity to negotiate more favourable contract terms (excluding those contract terms that deal with the main subject matter of the contract, e.g. contract price or scope of work).

The amendments to the ACL will apply to standard form contracts:

-) entered into on or after 12 November 2016; and
-) with a contract value of up to \$300,000, or \$1,000,000 if the contract term is greater than 12 months.

What is an unfair term?

An unfair term causes a significant imbalance in the parties and is not reasonably necessary to protect the legitimate interests of the party relying upon it.

Examples of clauses found in typical construction contracts which may contain unfair terms include:

-) Time bars
-) Variation clauses
-) Liquidated damages clauses
-) Termination for convenience clauses
-) Limitation of liability clauses

What happens if a term is unfair?

If a term is found to be unfair, it will be void and is not binding on the parties.

Who determines whether a term is unfair?

Ultimately, only a court or tribunal can decide that a term is unfair. However, under security of payment legislation, an

adjudicator is required to apply the law. This would include determining (on an interim basis) whether a standard form contract contains voidable unfair terms and whether the clauses being relied upon by either party are enforceable.

We expect that unfair terms would almost certainly be in issue in any adjudication application involving a small business.

How will this impact the construction industry?

The construction industry will be particularly affected by these changes, as:

-) there are a large number of contractors and suppliers who will qualify as a small business;
-) use of standard form contracts is the typical method of procurement in the industry;
-) there are a number of industry-standard terms which may be found to be unfair under the new legislation; and
-) small businesses will be able to rely upon the fast track adjudication process provided for in security of payment legislation to enforce their rights.

Importantly, there is no exclusion for terms which have been back-to-backed from a head contract.

For example, if a small business does not comply with an unfair time bar in a subcontract (and consequently, the contractor is unable to comply with the corresponding time bar in the head contract), the contractor may be required to pay the subcontractor, but will not be entitled to payment itself.

What steps should you take to protect yourself?

In the coming months until 12 November 2016, if you are a principal or contractor who contracts with small businesses, you should consider taking the following steps:

-) Identify which of your contractors or suppliers are small businesses. This can be incorporated into the standard tender process.
-) Review your standard contract suite for terms that may be considered to be unfair.
-) Ensure these clauses are removed from any contract that relates to small businesses.
-) Create new standard form contracts to be used for small business contracts that do not contain any clauses that may be considered to be unfair.

For further advice concerning whether any of existing clauses in your contracts may be considered to be unfair, we recommend that you:

-) contact our team; and/or
-) ensure you are registered to attend our upcoming

Breakfast Seminar on this topic (details to be released soon).

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