

Agribusiness supply contracts and the unfair contracts regime: It's time to review your standard form contracts

The extension of the unfair contracts regime to small businesses will take effect in November 2016. Standard form supply contracts, such as those commonly used in the agribusiness sector, may be among the types of contracts scrutinised by the Australian Competition and Consumer Commission (ACCC). Now is the time to review your supply contracts to check that they will comply with the regime. In this note, we set out the initial questions you should be asking about your supply contracts.

Timing: When will the new regime start?

Contracts entered into before November 2016 will not be caught by the extension of the regime. However, the regime will apply to any contracts that are entered into or renewed after **12 November 2016**. In addition, any term of the contract that is varied after this date will also be subject to the regime.

Is the value of each of your supply contracts below the monetary limit set for the regime?

The unfair contracts regime will only apply to small business contracts in which the upfront price payable is equal to or less than **A\$300,000** or, if the contract has a duration longer than 12 months, **A\$1 million**.

Is your counterparty a small business?

For the regime to apply, at least one party to the contract must be a business that employs fewer than 20 people.

Is the subject matter of the contract covered by the regime?

The regime applies to contracts that are for the supply of goods or services or to the sale or grant of an interest in land.

There is a limited list of contracts that are excluded from the regime. For example, the regime does not apply to contracts that are constitutions of a company, managed investment schemes or other kinds of bodies. It also does not apply to contracts which are already regulated by prescribed laws.

Certain contract terms are also excluded but only to the extent that they (i) set the upfront price payable; (ii) are required by law; or (iii) define the main subject matter of a contract.

Are your supply contracts 'standard form'?

Additionally, the unfair contracts regime only applies to standard form contracts. If a party to a proceeding alleges that a contract is a standard

Key issues

- The monetary limit for application of the regime is **no more than \$300,000** or, if the contract is for more than 12 months, **\$1 million**
- The new regime will apply to standard form contracts entered into or renewed **after 12 November 2016**
- The ACCC has the power to investigate and challenge contracts
- No pecuniary penalties for breach, but unfair terms will be void and unenforceable.

form contract, then it is presumed to be so unless proved otherwise.

The court must take into account six matters when determining whether or not a contract is standard form, in addition to anything else it considers relevant.

The six matters are:

- whether one of the parties has all or most of the bargaining power;
- whether the contract was prepared by one party prior to any discussion between the parties;
- whether the contract was offered on a take it or leave it basis;
- whether there was any effective opportunity for negotiation;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction; and
- any other matter prescribed by the regulations (none at present).

Is there a risk that your contract contains unfair terms?

A term in a regulated contract will be unfair if:

- it provides for a significant imbalance in the parties' rights and obligations under the contract;
- it would cause detriment (financial or otherwise) if relied upon; or
- it is not reasonably necessary for the protection of the interests of the party advantaged by the term.

Examples of terms that the ACCC considers may be unfair include terms that:

- allow one party to unilaterally vary, renew or terminate the contract;
- allow one party to unilaterally determine whether the contract has been breached or interpret its meaning;
- penalises one party but not another for breach or termination of the contract;
- allows one party but not another to avoid or limit performance of the contract; or

- limits one party's rights in respect of any proceedings related to the contract.

What is the risk to your business?

Unfair terms may be declared void and unenforceable. However, there is the additional risk that the party may be unable to rely on the term in all the party's standard form contracts, not just the contract in dispute. This may have significant adverse consequences for a business as well as potentially damaging the business's reputation.

Unlike some other provisions of the Australian Consumer Law, breach of the unfair contracts regime will not result in pecuniary penalties.

Who could take action under the new regime?

The ACCC, as well as the other party, can challenge a small business standard form contract under the new regime. Obviously the ACCC's investigative and enforcement powers increase the risk of regulatory action against businesses.

We expect the ACCC will be active in this area given that it has established an Agricultural Enforcement & Engagement Unit and has repeatedly indicated that competition and consumer issues in the agriculture sector are a priority.¹

¹ For example, the ACCC Chairman, Rod Sims, made this observation about the priority of the agriculture sector in a recent Media Release, *ACCC launches study into cattle and beef industry*, MR 40/16, 5 April 2016.

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