

Unfair Contract Terms – Will Your Contracts be held to be VOID?

A term of a “*Small Business Contract*” is void if the term is unfair and the contract is a “*Standard Form Contract*”.¹

What is a Small Business Contract?

A contract is a small business contract if²:

- (a) *the contract is for a supply of goods or services....; and*
- (b) *at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and*
- (c) *either of the following applies:*
 - i) *the upfront price payable under the contract does not exceed \$300,000;*
 - ii) *the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.*

Casual employees are not counted unless they are employed by the business on a regular and systemic basis; s 23(5) of the Australian Consumer Law (**ACL**).

What is a Standard Form Contract?

A contract will be presumed to be a “standard form contract” unless proven otherwise.

A court will likely take into account, inter alia, whether you prepared the contract/terms prior to any discussion relating to the particular transaction and whether you presented the terms on a “take it or leave it” basis.³

What is an Unfair Term?

A term of a small business contract is unfair if:

- (a) *it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;⁴ and*
- (b) *it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;⁵ and*
- (c) *it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.⁶*

¹ Schedule 2 of the Competition and Consumer Act 2010 (Cth) (the “Act”).

² S 23 ACL

³ S 27 ACL(2)

⁴ S 24(1)(a) ACL; E.g. whether the term in question is significantly weighted in favour of one of the parties – see *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481, 494; *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [127]; *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 at [54].

⁵ S 24(1)(b) ACL; Akin to the presumption relating to a contract being a standard form contract, subsection 24(4) sets up a rebuttable presumption in respect of subsection 24(1)(b) that a term is not reasonably necessary to protect the legitimate interests of a party who is advantaged by the term, unless that party proves otherwise. The first enquiry here is “legitimate interests” (e.g. in respect of the transaction). The second enquiry is “reasonably necessary”.

⁶ S 24(1)(c) ACL; See Explanatory Memorandum: “substantial likelihood of detriment relating to the application of or reliance on the term...”

Accordingly, if there is evidence (*in the context of the contract as a whole*), that: (1) the term would cause a significant imbalance in the parties' rights and obligations arising under the contract; (2) it would cause detriment to the claimant if it were to be relied upon; and (3) you cannot establish that the term is reasonably necessary in order to protect your own legitimate interests - the court is likely to find that the term is unfair. This is especially the case the less transparent the term is.

Examples

Statutory examples are provided in s 25 ACL. However, these are simply a form of statutory guidance. The ACL does not prohibit the use of those terms, nor do they create a presumption that those terms are unfair.⁷

Case Law Examples

The examples from the JJ Richards case⁸ are set out and summarised below⁹:

Term	Full extract	Why was it void?
Automatic renewal of term (cl 1)	<p><i>The term of this agreement shall be for an initial period of [initial term] years.</i></p> <p><i>The term shall be automatically renewed for further periods of [initial term] years thereafter unless terminated by either party giving written notice within 30 days prior to the end of the initial term or any renewed term.</i></p>	<p>The clause bound customers to subsequent contracts unless they cancelled the contract within 30 days before the end of the initial term or any subsequent contract term.</p> <p>No requirement for JJ Richards to provide notice of impending expiration or remind the customer of the right to terminate prior to the automatic renewal. Result may be that the customer inadvertently remains bound to JJ Richards for extensive periods with no opportunity to change to an alternative supplier during the term of the renewed contract.</p> <p>JJ Richards was more likely to be aware when customers' contracts are coming up for renewal.</p> <p>The significant imbalance arising from the operation of this clause was exacerbated by the operation of other unfair terms, such as the price variation, exclusivity and termination clauses (see below).</p> <p>Contracts were often low value, with low marginal cost to JJ Richards for each additional customer.</p>
Unilateral right to increase price at any time (cl 4)	<p><i>Price Variations. JJR may adjust its prices during the term of the agreement for reasons such as but not limited to increased operation costs, changes in disposal fees, site profitability, changes to disposal facility locations or increased</i></p>	<p>The clause allowed JJ Richards to unilaterally increase the price of services rendered for any reason.</p> <p>No corresponding right for any customer to terminate or obtain a change in the scope or scale of the service provided or a lower price.</p>

⁷ Edelman J in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33, 42 [44].

⁸ [Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd](#)

⁹ Note: the Court held that there was a lack of transparency; "densely packed page of small print terms and conditions" at [60], citing *Chrisco*, at [90]; and the interaction of the impugned terms with the contract as a whole increased the unfairness of the relevant terms; at [63].

	<i>government charges and levies by giving customers 30 days notice of such increase.</i>	Ability to increase prices simply due to desire to increase revenue or profitability.
Agreed time (cl 6)	<i>Agreed Times. JJR will use all reasonable endeavours to perform the collection at the times agreed but accepts no liability where such performance is prevented or hindered in any way.</i>	<p>The clause removed any liability for JJ Richards where performance had been prevented or hindered, or even where the customer was not in any way responsible for the prevention or hindrance or where JJ Richards was better placed than the customer to manage or mitigate the risk of the prevention or hindrance occurring.</p> <p>No corresponding benefit to JJ Richards' customers.</p> <p>Had the effect of absolving JJ Richard's of its performance obligations and of requiring customer's to assume risk of non-performance under circumstances in which they did not control.</p>
No credit without notification (cl 7)	<i>No credit without notification. Unless previously notified JJR shall be entitled to render charges for the service if it attends the customer's premises and is unable to perform the service due to holiday closure, lack of access or other reason. All credit requests must be within 14 days of invoice date.</i>	<p>Similar to the above clause (re absolved from any liability), JJ Richard's was also able to charge for services it had not rendered for reasons beyond the customer's control or potentially for reasons that were due to circumstances within JJ Richard's control.</p> <p>Further, the onus was unfairly placed upon the customer to seek a credit before any such "event" occurred.</p>
Exclusivity (cl 9(i))	<i>The customer agrees to: ... Grant JJR exclusive rights to the removal of waste, recyclables, combustible liquids and dangerous goods from the premises specified and not engage a second party for waste, recyclables, combustible liquids and dangerous goods removal during the term of this agreement.</i>	The clause required customers to obtain all of their waste management services from JJ Richards, even where they were seeking additional services to those provided by JJ Richards.
Credit terms (cl 6)	<i>Credit terms 7 days. The customer agrees to pay for the service subject to the credit terms and acknowledges service may be suspended if payment is not received. During the period of suspension normal charges will apply to cover expenses associated with the overdue payment including but not limited to, interest, administration, legals and equipment capital return.</i>	<p>The clause allowed JJ Richards to suspend services if not paid in a very short timeframe (7) days and to continue charging for administration, fees and other costs associated with the overdue payment (without any limitations and irrespective of whether JJ Richards had in fact incurred any such expenses).</p> <p>No corresponding right to the customer to withhold payment for failure to provide services or pass on associated costs that they had incurred as a result.</p>
Indemnity (cl 17)	<i>Indemnity. To the maximum extent permitted by law, the customer shall be responsible for and indemnify JJR from and in respect of all</i>	The indemnity clause was unlimited even when any loss is not attributable to the customer or could have been avoided or mitigated by JJ Richards.

	<i>liabilities, claims, damages, actions, costs and expenses which may be incurred by JJR on a full indemnity basis (whether successful or not) as a result of or arising out of or otherwise in connection with this agreement, including any breach by the customer of any of the warranties, covenants and conditions herein.</i>	No corresponding benefit to the customer.
Termination (cl 18)	<i>No termination without final payment. Payment in full of all monies outstanding must be made before this agreement can be terminated. The equipment will not be removed until such payment is made and rental for the equipment may be charged if delays in payment of the final account occur.</i>	This clause prevented a customer from terminating if they had payments outstanding and entitled JJ Richards to continue charging after termination despite the fact that no services had been provided.

The examples from the Servcorp case¹⁰ are set out and summarised below¹¹:

Term	Full extract	Why was it void?
<i>Insurance (cl 5)</i>	<p>...</p> <p><i>b. To insure all goods held in the Office(s) Servcorp will not be held responsible for loss, theft or damage of the good howsoever caused.</i></p> <p>...</p> <p><i>d. The client will not make any claim in tort, contract or otherwise against Servcorp's landlord under the Headlease.</i></p>	<p>This clause is similar the indemnity used by JJ Richards (e.g. no liability for loss, theft or damage, howsoever caused) but goes further in requiring the tenant to obtain insurance.</p> <p>The clause could be relied upon in circumstances where Servcorp had caused the loss, theft or damage.</p> <p>Conversely, the customer was required to indemnify Servcorp for equivalent claims with the exception of gross negligence and wilful misconduct.</p> <p>Customer is also limited in respect of the right to sue Servcorp, including in circumstances in which it had a legitimate claim.</p> <p>No reciprocal limitation on Servcorp.</p>
<i>Notice (cl 11)</i>	<i>b. Any written notice required or authorised by [the ASCI Contract]: Shall be deemed to have served on Servcorp only if emailed, hand delivered or sent by registered post to the Manager of the Servcorp location being occupied under this Service Agreement, and a</i>	<p>This clause allows Servcorp to unilaterally determine the time at which a notice had been validly served.</p> <p>No corresponding right to the customer.</p>

¹⁰ [Australian Competition and Consumer Commission v Servcorp Limited](#)

¹¹ Note: the Court held that the presumption that the terms were not reasonably necessary in order to protect the legitimate interests of Servcorp applied, at [57]. Further, the Court considered, in respect of each, the transparency of the term and the contract as a whole; at [42], [46]-[47], [49]-[50], [51]-[52] and [56].

	<i>confirmation of termination letter is received by the Client in return.</i>	
<i>Headlease (cl 12)</i>	<p><i>c. The Client shall comply with all Acts, Legislation, Regulations and bylaws as required by the Headlease and comply with any regulations or procedures issued or required by the landlord under the Headlease.</i></p> <p><i>d. Should the Client, in the absolute discretion of Servcorp, be carrying on illegal activities or be in breach of the provisions of Clause 12 c above, this Service Agreement shall terminate with immediate effect.</i></p>	This term allowed Servcorp to immediately terminate in circumstances where any asserted breach may not be a material breach, the customer may not have been notified of, or aware of, the breach or given an opportunity to remedy the breach, or the counterparty may have already remedied the breach.
<i>Termination (cl 13)</i>	<p><i>a. As governed by the Headlease, Servcorp may terminate this Service Agreement by giving on month's written notice to the client at any time.</i></p> <p><i>g. If the client fails to demand the refund of the security deposit within 360 days after the date of termination of this Service Agreement, the security deposit shall be deemed to be forfeited to Servcorp absolutely.</i></p>	<p>This term allowed Servcorp to terminate with one month's written notice (without any co-relation to the term of the contract), without cause or reason and without giving any compensation to the customer.</p> <p>In contrast, the customer had very limited termination rights.</p> <p>There were no obligation on Servcorp to return the security deposit or to notify them of the forfeiture. In effect, Servcorp could unilaterally acquire the customer's property.</p>
<i>Servcorp Clients (cl 21)</i>	<p><i>a. In the event that during this Service Agreement, or within two years of the termination or expiration of this Service Agreement, the Client entices or persuades clients receiving services of Servcorp or any Affiliate of such client to leave Servcorp offices and to move to other premises not owned or run by Servcorp or Servcorp's Affiliates and receive services not operated by Servcorp or Servcorp's Affiliates, this shall constitute a material breach of this (contract)</i></p> <p><i>b. In the event of a material breach of Clause 21a by the Client, the Client shall promptly pay to Servcorp an amount of US\$15,000 as a penalty.</i></p> <p><i>c. Payment of the penalty under Clause 21b shall not preclude Servcorp demanding further payment for damages.</i></p>	<p>This term imposed a penalty on the customer if it persuaded any other Servcorp customer to leave Servcorp and move to a competitor, even when the customer was unlikely to know whether the other customer is actually a customer or an affiliate of another customer.</p> <p>The penalty applied regardless of whether Servcorp suffered any loss or damage and did not prevent Servcorp from seeking further amounts as damages.</p>

Finally

The key takeaway point from these cases is the need to review any such contracts and update them where applicable as otherwise you may face liability or risk that such terms may be held to be void/unenforceable.

If you are concerned that any of the contracts used by or effecting your business may be impacted by the Unfair Contracts Terms regime, Gavin Parsons and Associates can assist you. Please contact us today on (02) 9262 4471 for a free half hour consultation on your standard terms and conditions.