

Australian Consumer Law in 2016: How to prepare for the unfair contracts regime and the first review of the national consumer protection laws

In its role as the national enforcer of consumer laws, the Australian Competition and Consumer Commission (ACCC) have been very active in taking enforcement action under the Australian Consumer Law (ACL) this year. Both the Government's first review of the ACL and the commencement of the unfair contracts regime for dealing with small business are set to occur in 2016. Companies should expect that consumer protection will continue to be a key priority for the ACCC next year and consider the impact on their business.

Introduction

For those doing business with small companies, it is important that you consider the implications of the new regime and what this means going forward, particularly on your existing and future standard form contracts.

You should also be aware that the agenda for the ACL review contemplates whether current penalties should be increased following calls for the more severe punishment of larger companies who have contravened the ACL.

Unfair contract terms for small business regime: Implications for business

Companies should consider the following points when reviewing compliance with the regime:

- **Due diligence:** Companies should conduct due diligence to assess where and how they interact with small business and identify what changes are necessary given the nature of the contracts and the thresholds stipulated by the new law.

Key issues

- The new unfair contracts regime for small business comes into effect on 13 November 2016 and businesses have approximately 12 months to consider the impact of the new regime and make any necessary compliance changes.
- Companies should use the time before the regime comes into effect to review their existing interactions and contracts to ensure they will be compliant.
- The ACL will be reviewed for the first time in 2016.
- The review will consider the adequacy of current penalty amounts for ACL breaches following suggestions that larger companies ought to be more severely penalised.
- Enforcement action under the ACL is a key priority for the ACCC as to how large companies interact with small business and consumers and companies should ensure compliance measures are at the top of the corporate risk agenda for 2016.

- **Plain English:** The form and transparency of provisions will also be scrutinised for unfairness and therefore terms should be drafted in plain English language, avoid ambiguities as well as omissions of relevant information.
- **Exemptions:** The new law will not apply to certain regulated industries where Codes such as the Oilcode and the Food and Grocery Code govern contractual dealings.
- **Compliance program:** As well as reviewing contractual terms for compliance, it is important that companies have a robust compliance program in place with appropriate up to date policies on small business dealings. Doing so will ensure any potential risks of non-compliance are identified and addressed as early as possible.
- **Unconscionable conduct:** The unfair contracts regime should not be considered in isolation, companies should actively consider the broader application of the laws of unconscionability and misuse of market power to their small business dealings.

Key changes under the new regime

The new provisions for unfair contract terms between businesses will apply to standard form contracts where:

- one party to the contract is a small business employing fewer than 20 staff;
- the upfront price payable is equal to or less than A\$300,000 or A\$1 million if the contract has a duration longer than 12 months; and
- the contract is for the supply of goods or services, or a

sale or grant of an interest in land.

Our earlier briefing discusses the detail of which agreements will be considered 'standard form' and what terms may be found to be unfair and therefore void and unenforceable.

The initial monetary thresholds for contracts that would be caught under the law (A\$100,000 and A\$250,000 for contracts with terms over 12 months) were increased by up to four times as the proposed legislation passed the Australian Senate.

It is likely that large businesses will have a significant number of contracts that fall within the higher A\$1 million threshold and many of these contracts will be with parties that have not conventionally been identified as 'small businesses'. This highlights the importance of companies undertaking appropriate due diligence as to who they contract with in the future.

Submissions on the draft form of the legislation suggest that the higher thresholds are designed to address industries where small businesses are said to be beholden to major suppliers with one sided, 'take it or leave it' type arrangements.

The transitional period for the commencement of the new law was increased from 6 months to 12 months. This will allow businesses more time to review and amend their standard form contracts and operational procedures to comply with the new legislation.

Review of the Australian Consumer Law

The terms of reference for the review are broad, and the purpose of the review is to assess the overall effectiveness of the ACL provisions. The ACCC has suggested reforms for

a number of key areas in light of its enforcement experience. Companies should consider the relevance of the following areas for their business, particularly as the regulator continues to focus on how larger companies interact with consumers and other small businesses:

- **Penalties:** The current maximum penalty available for a breach of the ACL is A\$1.1 million for a corporation or A\$220,000 for an individual. However in previous cases courts have questioned whether this amount is adequate to deter large corporations with multi-billion dollar annual revenues from engaging in unconscionable conduct and other breaches of the ACL.
- **Component pricing/drip pricing:** The ACCC has been particularly active in investigating and pursuing drip pricing practices by online booking platforms. The review may consider whether the current ACL provisions adequately compel businesses to make complete and upfront disclosure of pricing of goods and services.
- **Misleading or deceptive conduct:** The ACCC heavily relies on the misleading or deceptive conduct provisions in pursuing a wide range of actions in truth in advertising. The generality of the provisions have enabled the regulator to target conduct that is very industry specific and use court findings to define what standards of conduct should apply. The review should consider whether certain industries should be instead subject to industry codes and uniform standards.
- **Unconscionable conduct:** This year a major retailer admitted to

engaging in unconscionable conduct in respect of its dealings with its suppliers and was required to pay A\$10 million in penalties. The case highlights the exposure for large companies engaging in commercial negotiations with suppliers or other parties with less bargaining power. While the regulator has pushed the boundaries of the unconscionable conduct provisions to apply in these contexts, it remains to be seen whether the ACL review will propose any reforms to how these provisions operate.

- **Phoenix companies:** 'Phoenix companies' are described as failing companies who engage in harmful conduct toward consumers and suppliers and avoid any liability by shutting down and starting-up as a new company. The review will consider whether the current provisions of the ACL are adequate in holding such companies accountable for relevant breaches.

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SYD#7867902

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