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Unfair contract regime and its impact on local government contracts

By Trudi Firth

Changes to the law on unfair contact terms (**UCT**) came into effect on 9 November 2023. The changes broaden the scope of the UCT regime, and introduce significant pecuniary penalties on anyone who proposes, applies or relies on an ‘unfair term’.

Prior to entering into any contract, a local government should consider whether the UCT regime applies to the contract, and if the regime applies whether any of the terms of the contract are ‘unfair’.

Is the contract a standard form consumer contract or small business contract?

The UCT regime applies to standard form consumer contracts or small business contracts.

A consumer contract is a contract for the supply of goods or services or a sale or grant of an interest in land, to an individual, wholly, or predominantly for personal, domestic or household use or consumption.

A small business contract is a contract that satisfies all of the following criteria:

- the contract is for the supply of goods or services, or a sale or grant of an interest in land; and
- at least one party to the contract satisfies either or both of the following conditions:

1. the party makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons;
2. the party’s turnover for the last income year that ended before or at the time when the contract is made is less than $10,000,000.

If a contract is a small business contract or consumer contract, the next consideration is whether the contract is a ‘standard contract’. There is no blanket application to determine whether a contract is a standard form contract, and whether a contract is a standard form contract will be dependent on the facts, and a decision for the Courts. Pursuant to section 27(2) of the Australian Consumer Law (**ACL**) a court may take into account such matters it considers relevant, but it must take into account:

‘(a) whether one party had most or all of the bargaining power relating to the transaction;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required to accept or reject the terms of the contract (other than those defining the subject matter or upfront price payable under the contract, or those required by law) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract (other than those defining the subject matter or upfront price payable under the contract, or those required by law);

(e) whether the terms of the contract (other than those defining the subject matter or upfront price payable under the contract, or those required by law) take into account the specific characteristics of another party or the particular transaction; and

(f) any other matters prescribed by the regulations.'

In light of the above, we'd expect that a reasonable proportion of local government contracts may be standard form consumer contracts or small business contracts subject to the UTC regime.

Are any terms unfair?

A term of a consumer contract or small business contract is 'unfair' if the term:

- creates a significant imbalance in the parties' rights and obligations under the contract;
- is not reasonably necessary to protect the legitimate interests of the advantaged party; and
- would cause detriment (whether financial or otherwise) to the disadvantaged party if it were applied or relied on.

Section 25 of the ACL sets out examples of the kinds of terms that may be unfair, including terms:

(a) permitting one party (but not another party):

- to avoid or limit performance of the contract;
- to terminate the contract;
- to vary the terms of the contract;
- to renew or not renew the contract;

(b) penalising one party (but not another party) for a breach or termination of the contract;

(c) permitting one party to vary the upfront price payable under the contract, without the right of another party to terminate the contract;

(d) permitting one party to unilaterally:

- vary the characteristics of the goods or services to be supplied under the contract;
- determine whether the contract has been breached or to interpret its meaning; and

(e) permitting one party to assign the contract to the detriment of another party without that other party's consent.

Additionally, the Australian Consumer & Competition Commission has provided the following guidance notes to assist parties in reviewing contracts, namely:

- consider both points of view (not just your own);
- include counter balancing terms;
- avoid terms that are unnecessarily broad;
- ensure that none of your terms either intentionally (or unintentionally) conflict with the Australian Consumer Law, or any other law;
- ensure that your contracts are written in plain English; and
- take steps to ensure transparency.

Next steps

If a local government considers that any of its contracts may be standard form consumer contracts or small business contracts, it should closely review the terms of those contracts and remove any 'unfair' terms. Under the amended regime, not only are 'unfair' terms void, but substantial pecuniary penalties will apply to a person who proposes, applies or relies on an unfair term.

Local governments should also undertake measures to minimise the implications of the UTC regime, including:

- avoiding 'a take it or leave it approach', and being open to negotiate the terms of contracts;
- reviewing any document, which it considers may be a standard form consumer contracts or small business contracts, to remove any 'unfair' terms; and
- keeping records, or inserting explanatory clauses, explaining why a particular special condition was necessary for the protection of a local government's legitimate interest (for example, why a local government landlord may in a particular lease require the ability to terminate a lease for its convenience).

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Trudi Firth by email to tfirth@mcleods.com.au.

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