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Extending Unfair Contract Term Protections to Small Business

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SUMMARY OF PAPER

1. Amendments to the Australian Consumer Law¹ (“ACL”) and the *Australian Securities and Investments Commission Act 2001* (Cth) (“ASIC Act”) will commence operation on 12 November 2016. The amendments will have the effect of extending the unfair term protections presently available to consumer contracts to small business contracts. There are a number of considerations in determining whether a contract is a small business contract for the purposes of the legislation. They include; whether a standard form contract is used; whether the upfront price is below \$300,000 or \$1 million for contracts exceeding 12 months in duration; whether there is a small business as a contracting party and when the contract was entered into or renewed. There are some contracts that are expressly excluded from the regime including most contracts of insurance and contracts for shipping or marine contracts including contracts for the carriage of goods by ship.
2. The unfair term protections provide for unfair terms to be void and thus of no legal effect. Unfair terms may often be characterised as affording rights to or restricting rights from one party and not the other, although this characteristic in and of itself does not make a term unfair. Whether a term is unfair is determined by application of a statutory three-limb “fairness” test and considerations of transparency in light of the contract as a whole. If a term is found by the courts to be unfair (and thus void), the contract may still continue to operate if it can do so without the unfair term. The protections do not operate in respect of terms setting the upfront price or terms that define the main subject matter.
3. Businesses still have time to carry out due diligence on their standard form contracts prior to entering into or renewing contracts or varying terms in contracts on or after 12 November 2016. Application of the fairness test on terms in standard form contracts particularly in relation to terms affording unilateral rights, an examination of their relative transparency and whether re-drafting or “re-casting” is required will assist in reducing the risk of disputes

¹ *Competition and Consumer Act 2010* (Cth), Sch 2.

(including litigation) with business partners concerning the fairness of their business dealings.

INTRODUCTION

4. This paper discusses the forthcoming reforms to consumer protection legislation, which will extend the operation of the unfair term protections in consumer contracts to contracts entered into by a small business. The paper explores what contracts will be subject to these reforms, what terms might be considered unfair in these contracts and what action can be taken by businesses in preparation for this legislative change.
5. On 12 November 2016, amendments to Part 2-3 of the ACL and Part 2 of the ASIC Act will commence operation. The amendments are in consequence of the enactment of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth), which was assented to on 12 November 2015.
6. These amendments will have the effect of extending the unfair term protections already provided to consumers to small businesses entering into standard form contracts. The extension of these protections will in effect provide for unfair terms in “small business” contracts to be void.

BACKGROUND TO THE CONSUMER LAW PROTECTIONS

7. ‘The ACL, which commenced operation on 1 January 2011, sets out a national law for consumer protection and fair trading. Succeeding the *Trade Practices Act 1974*, the ACL provides an exemplar of cooperative reform between the State and Territory governments and the Commonwealth.
8. The ACL reform process is orchestrated through the Legislative and Governance Forum on Consumer Affairs. The Australian Competition and Consumer Commission (“ACCC”) and Consumer Affairs Victoria (“CAV”) and the other state and territory equivalents jointly enforce the legislative regime. Additionally, the Australian Securities and Investments Commission (“ASIC”) enforces the equivalent provisions in the *Australian Securities and*

Investments Commission Act 2001 (Cth) (“ASIC Act”) in relation to financial products and services.

9. Identified as Schedule 2, the ACL is annexed to the *Competition and Consumer Act 2010* (Cth). Each state and territory has enacted legislation to apply the ACL as a local law. In Victoria it is s 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), which enables the ACL’s operation in the state jurisdiction.

WHAT CONTRACTS WILL BE EFFECTED?

10. The legislative amendments will effect contracts that:

1. Are entered into or renewed or varied (but effecting the varied terms only)² on or after 12 November 2016; and
2. Is a standard form contract; and
3. Is defined under the relevant provisions as a *small business contract*.

A *small business contract* is a contract that:

4. (under the ACL only) is ‘for a supply of *goods or services*, or a *sale or grant of an interest in land*³; OR
5. (under the ASIC Act only) ‘[i]s a financial product or a contract for the supply, or possible supply, of services that are financial services;’⁴ and
6. Has at least one party to the contract that is a *small business* within the meaning of the ACL and the *ASIC Act*⁵; and
7. Has an “*Upfront Price*” that does not exceed \$300,000 (or \$1m for contracts in operation for more than 1 year)⁶.

11. The contract must exhibit all of these characteristics for the unfair term protections to be engaged (save for the differing subject matter governed

² The regime does not extend to small business contracts that have been assigned on or after 12 November 2016.

³ ACL, s 23(4)(a). Note this limb of a small business contract is not applicable to a small business contract for financial products and contracts for the supply or possible supply of financial services. See s 12BF(4) of the ASIC Act s 12BF(4) of the amended ASIC Act (in operation on 12 November) or s 8 of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*.

⁴ ASIC Act, s 12GND(3)(b). NOTE: This and all references to the amended provisions refer to the ACL and the ASIC Act that will be in operation on 12 November 2016.

⁵ ACL s 23(4)(b); ASIC Act, s 12BF(4)(a).

⁶ ACL s 23(4)(c); ASIC Act, s 12BF(4)(b)

respectively by the ACL and *ASIC Act* as noted at paragraphs 10.4 and 10.5 above).

HOW DOES THE REGIME DEFINE A STANDARD FORM CONTRACT?

12. Under the legislation, if a term in a contract is alleged to be unfair, the existence of a standard form contract is presumed. However, the presumption is made rebuttable under the respective statutes.⁷ If the presumption is challenged by a party to a proceeding, the court will take into account such matters as it thinks relevant.⁸ Applied generally, the court may ask what genuine level of negotiation took place between the parties prior to entering the agreement. It may also ask; was the contract offered on a take it or leave it basis?
13. In considering whether a contract is a standard form contract the court must take into account the following:
 1. Whether one of the parties has all or most of the bargaining power relating to the transaction;
 2. Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
 3. Whether another party was, in effect, required either to accept or reject the terms of the contract...in the form in which they were presented;
 4. whether another party was given an effective opportunity to negotiate the terms of the contract... other than the main subject matter, upfront price or terms required by law;
 5. Whether the terms of the contract...take into account the specific characteristics of another party or the particular transaction;
 6. Any other matter prescribed by the regulations.⁹
14. Justice Gilmour, in a decision in *ACCC v CLA Trading Pty Ltd*, said that
‘[t]erms of [standard form] contracts are generally presented on a “take it or

⁷ ACL s 27(1); *ASIC Act*, s 12BK(1)

⁸ *Ibid*

⁹ ACL, s 27(2); *ASIC Act*, s 12BK(2).

leave it basis”, with the consumer facing the alternatives of either accepting the terms without negotiation or not contracting at all.’¹⁰

15. The court in *Ferme & Ors v Kimberley Discovery Cruises Pty Ltd*¹¹ also considered this question. The case concerned an agreement by which a tour operator agreed to conduct river cruise tours of the Kimberley in exchange for payment of a fare. Unforeseen weather conditions forced the cancellation of the tour and litigation ensued. The litigation was primarily concerned with whether the forfeiture clause in the consumer contract was unfair to the extent that it did not guarantee a refund or replacement tour in the event of the tour’s cancellation. The threshold question, however, concerned whether the contract was a standard form contract and thus whether the ACL protections could be engaged.
16. The court considered whether the parties were in a position to negotiate the standard terms and conditions, which is a factor in determining the existence of a standard form contract. The judge went on to find (amongst other considerations) that there was no evidence ‘that the contracts, and specifically, the terms & conditions were negotiated and the terms settled separately with each applicant’.¹² The court was ultimately not satisfied that the respondent had ‘proved that the contracts with each of the applicants in this case were not standard form contracts for the purposes of Part 2-3 of the Australian Consumer Law.’¹³

SUPPLY OF GOODS AND SERVICES OR SALE OR GRANT OF AN INTEREST IN LAND

17. As previously stated, for the ACL protections to be engaged, the contract must be for the supply of goods and services or sale or grant of interest in land. Section 2(1) of the ACL defines supply...to include in relation to goods—supply (including re supply) by way of sale, exchange, lease, hire or hire purchase; and

¹⁰ *ACCC v CLA Trading Pty Ltd* [2016] FCA 337 at [48]

¹¹ [2015] FCCA 2384

¹² *Ibid* at [47]

¹³ *Ibid* at [51]

in relation to services—provide, grant or confer. The *ASIC Act* provides an identical meaning in relation to the supply of services.¹⁴

18. The ACL defines goods to *include*:

1. ships, aircraft and other vehicles; and
2. animals, including fish; and
3. minerals, trees and crops, whether on, under or attached to land or not; and
4. gas and electricity; and
5. computer software; and
6. second hand goods; and
7. any component part of, or accessory to, goods.¹⁵

19. The ACL defines services to include:

1. any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
2. without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
 - i. a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or
 - ii. a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - iii. a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
 - iv. a contract of insurance; or
 - v. a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

¹⁴ *ASIC Act*, s 12BA(1)

¹⁵ ACL, s 2.

- vi. any contract for or in relation to the lending of money; but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.¹⁶

20. Based upon the above inclusive definitions, it appears the legislature intended for “goods” and “services” to be interpreted broadly although there are some limits to what a good can be defined as. As Edelman J explained in *ACCC v Valve Corporation (No 3)*, ‘a chose in action, such as a debt, is not a “good”. A chose in action is a right against a person. It is not a right in relation to a thing.’¹⁷

21. The ACL defines an interest in land as:

1. ‘a legal or equitable estate or interest in the land; or
2. a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
3. a right, power or privilege over, or in connection with, the land.’¹⁸

22. Section 12BF(1)(c) of the *ASIC Act* makes it clear that it is concerned with a contract that is ‘(i) a financial product; or (ii) a contract for the supply, or possible supply, of services that are financial services.’¹⁹ Significantly, a financial product includes a credit facility, which extends to the hire, lease or rental of goods or services (providing a deposit matching or exceeding the value of the good is not paid).²⁰

¹⁶ ACL, s 2(1).

¹⁷ [128]

¹⁸ Ibid.

¹⁹ Sections 12BAA and 12BAB of the *ASIC Act* define respectively financial product and financial service.

²⁰ ASIC Act, s 12BAA(7)(k); *Australian Securities and Investments Commission Regulations 2001 (Cth)*, r 2B(2)(b)(iv).

DEFINING THE “SMALL BUSINESS” in a SMALL BUSINESS CONTRACT

23. As previously stated, the ACL and the *ASIC Act* defines a small business contract as one where at least one party is a “small business” at the time of entry into that contract. So what is a small business? The new s 23(4) of the ACL and s 12BF(4) of the *ASIC Act* states:

1. A contract is a small business contract if: (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons.
2. Sub-section (5) of both pieces of legislation further clarifies that ‘a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.’²¹

24. Defining a small business in this way for the purposes of ascertaining whether a small business contract is being entered into (or has been entered into) prompts one to ask:

How will a contracting party know at the time of entering the agreement how many employees the other contracting party has, let alone whether they are employed on a regular and systematic basis?

25. Assuming the other contracting party willingly and accurately divulges this information, the other contracting party must first categorise the casual employees as either employed on a regular and systematic basis or not employed on this basis. Are seasonal employees, for example, employed on a regular and systematic basis?

26. The Explanatory Memorandum to the amending Act states:

In calculating the number of persons a business employs, a head count approach (regardless of an employee’s hours or workload) is used. Casual employees are to be counted only if they are employed on a

²¹ ACL, s 23(5); *ASIC Act*, s 12BF(5).

regular or systematic basis, to account for seasonal variations. This is the approach used in the *Fair Work Act 2009*...²²

27. This reference to the *Fair Work Act 2009* (Cth) does not advance the meaning of “regular” and “systematic” very far as the Act uses precisely the same words as that used in the ACL and the *ASIC Act*.

A casual employee is not to be counted unless, at that time, *he or she has been employed by the employer on a regular and systematic basis*.²³

The wording in these statutes might suggest that seasonal fruit pickers that come back each season might be employed on a regular or systematic basis but those that are replaced each year are not. On such a reading, a business that employs each year dozens (or even hundreds) of casual employees but replaces them every season would, (by this logic) potentially render it “small”. Of course, it will be for the courts to decide how “regular” and “systematic” will be defined under these statutes.

28. Another uncertainty raised in respect of the “headcount” definition concerns whether a small business can be a subsidiary of a larger business. The amending legislation does not clarify whether a business employing less than 20 people that is also a subsidiary of a (much larger) corporate entity (that employs thousands) but can nevertheless be categorised as a “small business” for the purposes of classifying a contract as a “small business” contract. Thus, it might be surmised that the definition (or lack thereof) leaves open the potential for much larger businesses to take advantage of these protections.

29. The *Fair Work Act* also defines a small business employer but as an employer that ‘employs fewer than 15 employees at that time’²⁴ in contrast to ‘fewer than 20 persons’ under the amendments in the ACL and *ASIC Act*. The provisions in the *Fair Work Act* relevantly state that; ‘for the purpose of calculating the

²² Explanatory Memorandum to the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015*, p12.

²³ *Fair Work Act 2009*, s 23(2)(b). *My emphasis added*.

²⁴ *Fair Work Act 2009*, s 23(1).

number of employees employed by the employer at a particular time, associated entities are taken to be one entity.²⁵ Whether the courts will be willing to be informed by the *Fair Work Act* on this point remains to be seen.

CALCULATING THE “UPFRONT PRICE”

30. The third essential feature of the contract for there to be a “small business” contract is for the price not to exceed the “upfront price” threshold. The statutes provide that a contract is a small business contract (in addition to there being at least one small business contracting for a supply of goods or services, or a sale or grant of an interest in land or for a financial product or service) if:

1. The upfront price payable under the contract does not exceed \$300,000; OR
2. The contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.²⁶

A further provision in the legislation provides additional guidance. It states:

The upfront price payable under a contract is the consideration that:

- i. is provided, or is to be provided, for the supply (, sale or grant²⁷) under the contract; and
- ii. is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.²⁸

31. Thus, early termination fees, late payment fees, royalty payments, finder’s fees or success or win fees are not included in a calculation of the upfront price if they are contingent on the occurrence or non-occurrence of a particular event. Further, the *ASIC Act* expressly excludes interest on credit from the upfront

²⁵ *Ibid*, s 23(3)

²⁶ *ACL*, s 23(4)(c); *ASIC Act* s 12BF(4)(b).

²⁷ *ACL* only.

²⁸ *ACL*, s 26(2); *ASIC Act* s 12BI(2).

price²⁹ but does include the total amount of principal that is owed under the contract.³⁰

32. In summary, if the price:

1. Is disclosed at the time of entering into the contract; and
 2. Is not contingent on the occurrence or non-occurrence of an event; and
 3. Can be calculated at the time of entry into the contract;
- the price will generally be regarded as an upfront price.

ARE THERE CONTRACTS THAT ARE EXPRESSLY EXCLUDED BY THE REGIME?

33. A number of categories or classes of contracts have been expressly excluded from the operation of the new legislation. As noted earlier, contracts that are entered into before 12 November 2016 (unless renewed on or after this date) will not be effected.³¹ Further, s 28(1) of the ACL excludes shipping or marine contracts including ‘a contract for the carriage of goods by ship’. Section 28 also excludes a contract that is the constitution (within the meaning of section 9 of the *Corporations Act 2001*) of a company, managed investment scheme or other kind of body.³² By operation of Section 15 of the *Insurance Contracts Act 1984* (Cth.), most contracts of insurance will not be subject to the protections.

34. There are also provisions for the Minister for Small Business to exclude certain classes of contracts by regulation. The statutes relevantly state a small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies will also be excluded from the protections.³³ The Minister is, however, required to take certain steps prior to a regulation being made in this regard. The legislation provides that before... a regulation prescribing a law for this purpose is made the Minister must be satisfied that the law provides enforceable protections for small businesses that are equivalent to the

²⁹ ASIC Act, s 12BF(6).

³⁰ ASIC Act, s 12BI(3)

³¹ See ACL, s 290A

³² ACL, s 28(2)

³³ ACL, s 28(4) and ASIC Act, s 12BL(2)

protections provided by [the unfair term protections]...and...must take into consideration any detriment to small businesses of that kind resulting from prescribing the law; and the impact on business generally resulting from prescribing the law; and the public interest.³⁴

35. It remains to be seen whether any category of small business contract or, in effect, industry or sector will be exempted by the Minister from these protections having regard to what laws are in place that might be considered as affording equivalent protections.

WHAT IS AN UNFAIR TERM?

36. The ACL and the *ASIC Act* sets out a three-limb fairness test that must be met in order for the court to find that a term in a small business contract (or a consumer contract) is unfair (and consequently void).³⁵ The test can be helpfully posed as three questions:

1. Would the term cause a significant imbalance between the parties' rights and obligations arising under the contract? AND
2. Is the term not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term? AND
3. Would the term cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on?

If all three questions are answered in the affirmative the impugned term will be found to be unfair and void by virtue of s 23 of the ACL or s 12BF(1) of the *ASIC Act*.

37. In considering these questions, the court must examine the term in the context of the contract as a whole and may take into account any matters it considers relevant.³⁶ Further, in considering these questions the court must also consider whether the impugned term is transparent. A term is transparent, according to the legislation, if the term is expressed in reasonably plain

³⁴ *Competition and Consumer Act 2010*, s 139G(2); *ASIC Act*, s 12BL(3)(b)

³⁵ *ACL*, s 24(1); *ASIC Act*, s 12BG(1).

³⁶ *ACL*, s24(2); *ASIC Act*, s 12BG(2).

language, legible, presented clearly and readily available to any party affected by the term.³⁷

38. In applying the fairness test to a term of a contract, if the three questions are answered in the affirmative notwithstanding the term is transparent is it still possible for the court to find the term to be unfair? Justice Cavanough, a judge of the Supreme Court of Victoria, expressed the view that even if there is sufficient transparency of the impugned term there may still be circumstances where a term may be unfair in situations where there is ‘such a significant imbalance in the parties’ rights and obligations arising under the contract.’³⁸

39. Section 25 of the ACL and s 12BH of the *ASIC Act* provide ‘examples of the kind of terms in (a consumer contract or) small business contract that may be unfair:

1. a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
2. a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
3. a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
4. a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
5. a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
6. a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
7. a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

³⁷ ACL s 24(3); ASIC Act, s 12BG(3).

³⁸ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539

8. a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
9. a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
10. a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
11. a term that limits, or has the effect of limiting, one party's right to sue another party;
12. a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
13. a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
14. a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.'

40. In summary then, whether the term is unfair or not will depend on the application of the fairness test and cognate considerations of transparency in light of the contract as a whole. Based on the examples provided in the statutes, the following examples of rights accorded or restricted by one party, depending on the circumstances, may make a term unfair.

1. A term that allows a party to unilaterally vary the contract such as increasing the termination fee;
2. Renewal terms where significant notice is required or fees imposed in the event of not renewing;
3. A term limiting liability to a party in the event that party causes damage to the goods the subject of the contract;
4. A liquidated damages clause that does not fairly reflect the true cost of the termination;
5. A forfeiture clause where one side can terminate a contract for no reason and/or retain funds invested in the business by the other party; and
6. An indemnity clause that only indemnifies for any loss or injury caused by one party and not the other;

41. It is important to be aware that some terms of a small business contract (and consumer contracts) are exempt from the unfair term protections. These are terms that;

1. Define the main subject matter of the contract; or
2. Sets the upfront price payable under the contract; (and remember this also partly determines whether a contract is a small business contract) or
3. Is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.³⁹

The upfront price exclusion ensures that the price of a good or service cannot be challenged on fairness grounds in circumstances where prior to entering the contract the purchasing party was made aware of the price. A price contingent on the occurrence or non-occurrence of a particular event, however, will not be exempt from the unfair term protections such as early termination fees or, depending how they are drafted, royalty payments in a franchise or licensing agreement.

42. We turn now to how the authorities have applied the fairness test in the *consumer contract* context. In applying the fairness test, as noted at paragraph 36 above, we consider three questions.

Question One: Would the term cause a significant imbalance between the parties' rights and obligations arising under the contract?

- i. In *Griffiths v LMM Holdings Pty Ltd*⁴⁰ Judge Jarrett found that a term that allowed a car dealer to unilaterally 'increase the purchase price of the motor vehicle' to be not unfair because it also provided 'that if the price is increased, the purchaser can terminate the contract.'⁴¹ His Honour found that the term did not cause a significant imbalance between the parties' rights and obligations arising under the contract.

³⁹ ACL, s 26(1); ASIC Act, s 12BI(1)

⁴⁰ [2016] FCCA 2322

⁴¹ *Ibid* [65]

Question Two: Is it not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term?

- ii. In *ACCC v ACN 117 372 915 Pty Limited (in liq)* (formerly Advanced Medical Institute Pty Limited)⁴² the court considered whether Advanced Medical Institute had in its standard form contract, amongst other things, a refund term that was unfair and void under the ACL. The refund term provided that, on giving notice of termination of their contract, patients were only entitled to receive a refund after an “administrative fee” of 15 per cent was deducted from the entire initial cost of the contract. Justice North found that the imposition of the administration fee was not reasonably necessary to protect the defendant’s legitimate interests and ultimately found it to be unfair.
- iii. By contrast, in *Bransgrove v Sebring Pty Ltd & Anor*,⁴³ found that a clause in a car rental contract requiring the renting party to pay for any overhead damage to a rental vehicle as fair, in part, because it was reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. This was found to be so because the rental car business could not obtain insurance cover for overhead damage.

Question 3: Would the term cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on?

- iv. In *ACCC v Chrisco Hampers Australia Ltd*,⁴⁴ the court had to consider whether a term known in the contract as the HeadStart term was unfair within the meaning of s 24 of the ACL. The HeadStart term provided that the direct debits made by the customer would continue following final payment of the existing hamper order. The subsequent payments would be put toward the following year’s hamper order even though the customer had not entered into any agreement to make a subsequent purchase. The Court found that the term would cause financial detriment to

⁴² [2015] FCA 368

⁴³ [2012] VCAT 1189 at [64] – [66]

⁴⁴ [2015] FCA 1204

the customer without any corresponding right afforded the customer by Chrisco Hampers.⁴⁵

WHAT ACTION CAN YOUR CLIENTS TAKE NOW?

43. What can your clients do in order to comply with the new requirements whether they be small or other size businesses? It may be prudent to review standard form contracts if the client contracts regularly with “small” businesses. Consideration might be given to terms by application of the fairness test and their relative transparency in light of the contract as a whole. Consider, for example, whether terms affording unilateral rights go no more than what is reasonably necessary to protect the client’s legitimate interests. Consider also whether the term is drafted in reasonably plain language, is legible, presented clearly and is readily available to other party. It may also be advantageous for the client to have two standard form contracts; one that is suitable to transact with a small business and one that is used when the parties are not subject to the unfair term protections.
44. If your client is a large or small business, it may be appropriate to apply the criteria by which a small business contract is determined in relation to contracts to be entered into or renewed after 12 November. Examine, for example, and calculate the “up-front price”. Due diligence applied to terms varied after 12 November may also be prudent. Consider whether the varied term deals with a unilateral right. Does it create a significant imbalance in the parties’ rights and obligations arising under the contract? Is it reasonably necessary to protect the client’s legitimate interests? Would it cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon?
45. It may also be sensible to assess whether a client is a small business for the purposes of the regime. An employee head-count prior to entering a contract after 12 November 2016 may be advisable. This may be of particular importance for those clients that have businesses that employ approximately 20 employees or experience frequent and seasonal variations in their employee

⁴⁵ Ibid at [95] – [97]

numbers, which fluctuate above and below the 20 person threshold. What if your “small business” client is shortly entering into a business to business agreement using a standard form contract? If the price is below the upfront cost threshold, consider whether it is practical and beneficial for the client to enter the contract after 12 November in order to avail itself of the unfair term protections.

WHAT ACTION CAN A SMALL BUSINESS TAKE AFTER ENTERING A CONTRACT?

46. If a small business enters into a standard form contract on or after 12 November 2016, which has an “upfront price” below the threshold and there is reason to believe a term or terms in the contract are unfair there a number of steps the client may consider. Negotiating with the other party is an obvious and often mandatory first step in some industries and sectors. It may be advisable, depending on the nature of the dispute, to contact the relevant industry ombudsman or dispute resolution agency such as the Horticulture Mediation Advisor or the Office of the Franchising Mediation Advisor.
47. A contracting party that is a “small business” (and the relevant regulator) has standing to launch court proceedings by which a declaration can be sought⁴⁶ that the impugned term is unfair. By operation of the relevant provisions under the ACL and the *ASIC Act* the term is void if it is unfair.⁴⁷ There is also provision for the court to make orders to compensate the injured party in whole or in part for any loss or damage or make orders to prevent or reduce the loss or damage arising from another person applying or relying on, or purporting to apply or rely on the unfair term.⁴⁸ If a term is or terms are found to be unfair the contract can still continue to operate provided it can still do so without the unfair term or terms.⁴⁹ Injunctive relief, both permanent and interim, can also be sought under the ACL and the *ASIC Act*.⁵⁰

⁴⁶ ACL, s 250(2); *ASIC Act*, s12GND

⁴⁷ ACL, s 23(1); *ASIC Act*, s 12BF(1)

⁴⁸ ACL, s 238; *ASIC Act*, s 12GM

⁴⁹ ACL s 23(2); *ASIC Act*, s 12BF(2)

⁵⁰ ACL s 232(1); *ASIC Act*, s 12GD(1)

48. If the client is considering litigation, it is important to apply the applicable regime. The Full Court of the Federal Court in *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (In Liq)* found that contracts for the leasing out of telecommunications equipment were held to be credit facilities and therefore financial products.⁵¹ Similarly, in *ACCC v CLA Trading Pty Ltd* a car rental contract was determined to be a financial product within the meaning of s 12BAA of the ASIC Act.⁵² Therefore, in both actions the *ASIC Act* applied.

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⁵¹ [2013] FCAFC 5; (2013) 209 FCR 368 at [117] - [125].

⁵² [2016] FCA 337 at [48].