

Customs and Global Trade Update

March 2015



Proposed changes to unfair contract term laws and how they impact customs brokers/forwarders

The Federal Government recently announced that laws protecting consumers against unfair contract terms will be extended to provide protection to the small business sector. This raises a number of issues for customs brokers and freight forwarders, particularly in respect to exclusions of liability, situations where carriage of goods can be avoided and penalties for breaching the contract.

WHAT'S THE ISSUE?

Many businesses operate on the basis that their customers accept a standard form contract, that is, a contract that is not negotiated and presented on a take it or leave it basis. These contracts are commonly one sided. Often terms may be included excluding any liability for negligence, allowing the supplier to take payment but avoid supplying the services or allows the supplier to unilaterally change contract terms, including the price for services.

Where consumers enter into these contracts, provisions exist allowing a Court to declare a term unfair and make it unlawful for the supplier to rely on that term. Following a review, the Federal Government has announced that the unfair contract provisions will be extended to protect small businesses.

WHAT IS THE IMPACT FOR BROKERS/ FORWARDERS?

You supply small businesses

Almost all brokers/forwarders will supply services to small businesses through the use of a standard set of terms and conditions. This contract is likely to be covered by the new law in situations where you have most of the bargaining power and your T&Cs are offered on a “take it or leave it basis”.

A term in those standard T&Cs will be potentially unenforceable against a small business customer where it is considered unfair. Terms will be considered unfair where they:

- a) cause a significant imbalance in the parties rights and obligations;
- b) are not reasonably necessary to protect the interests of the advantaged party; and
- c) would cause detriment to the small business if relied on.

Examples may be a clause that requires the small business to indemnify the broker/forwarder even where the loss was caused by the negligence of the broker/forwarder or a clause that enables the broker/forwarder to amend the terms of the contract without the consent of the small business.

You are a small business

If you are a small business you may be subject to unfair contract terms in standard form contracts that may in the future be unenforceable. Standard form contracts are often used by energy providers and telecommunication companies.

It is not clear yet whether supplies by small businesses will be covered. For example, if you supply clearance services to a listed company and it provides the standard form contract, will you be able to avoid unfair contract terms within that contract? The current consumer provisions only apply to acquisitions by the consumer.

Exclusion of shipping contracts

The current unfair contract provisions applying to consumers do not apply to shipping contracts. This may be reviewed as part of a broader review of the Australian Competition and Consumer law. However, if this exception remains, it is important for brokers/forwarders to consider whether their terms and conditions should have separate provisions that

apply to shipping contracts only (not covered by the law) and other provisions which apply to customs clearance, storage, land transport and advisory services.

ISSUES TO BE DETERMINED

The recent announcement leaves many questions unanswered. Most importantly, what is a small business for the purpose of this law? Will it be based on staff numbers (15 or less?), annual turnover (\$2 million or less?) or the size of an individual transaction (\$40,000 or less?).

Will the provisions apply to contracts where a small business is supplying a large business? For example, where a small business supplies one of the large supermarket chains and must accept their terms and conditions. The current consumer provisions naturally only apply to acquisitions by the consumer.

Will the provisions apply to supplies by one small business to another small business? It may be thought that in this scenario there is not an imbalance of bargaining positions and legislative protection is not needed. If the provisions do extend to such transactions it may cover situations where a freight forwarder engages a broker to perform services.

IMPACT FOR THE INDUSTRY

Standard form T&Cs are common in the customs and transport industry. Most often these T&Cs are one sided and reflect pricing that is based on zero liability. It also reflects the reality that often some part of the services will be performed by third parties who will also expect zero liability.

Such limitations on liability have allowed extremely competitive pricing. If the ability to fully exclude liability is removed, but pricing pressures remain, the industry will be placed under even greater pressure.

The introduction of the consumer provisions ultimately saw an improvement in standard form consumer contracts. Clearer language was used, and unfair terms that were not necessary for the protection of the service provider were often removed. There will undoubtedly be some brokers/forwarders who adopt this approach and others who prefer to keep their T&Cs as is and rely on them until a Court says otherwise.

We recently alerted readers as to the many reasons to **review your T&Cs**. This proposed change is yet another significant reason why such a review is important.

Authors: Russell Wiese, Partner | Lynne Grant, Special Counsel | Fran Smyth, Lawyer

Disclaimer: The information contained in this update is not advice and should not be relied upon as legal advice. Hunt & Hunt recommends that if you have a matter that is legal, or has legal implications, you consult with your legal adviser.