

## SERVCorp CONSENTS TO COURT ORDERS THAT CONTRACT TERMS WITH SMALL BUSINESS UNFAIR

[Australian Competition and Consumer Commission v Servcorp Limited \[2018\] FCA 1044](#) determined that Servcorp Limited (“Servcorp”) and its subsidiaries had caused contracts with small business to be entered into which contained unfair terms. This was an action commenced by the Australian Competition and Consumer Commission (“ACCC”) against Servcorp and some of its subsidiaries.

Servcorp is a publicly listed company and a holding company of a range of companies providing office space and office support services across Australia. Servcorp, through its subsidiaries, entered into contracts with small business for the provision of office space and office services.

ACCC argued that pursuant to the Australian Consumer Law (“ACL”) contained in Schedule 2 of the [Competition and Consumer Act 2010](#), the relevant contracts were in standard form (Section 27 ACL) and would cause detriment to the small businesses (Section 24 and 25 ACL).

The Federal Court determined that the contracts between the Servcorp subsidiaries and the small business customers contained unfair terms (Section 24 ACL) and therefore, those terms were void (Section 23 ACL) because those terms:-

- (a) would cause a significant imbalance in the parties’ rights and obligations;
- (b) were not reasonably necessary in order to protect the legitimate interests of the Servcorp subsidiaries; and
- (c) would cause detriment (whether financial or otherwise) to the small business customers if they were to be applied or relied upon by the Servcorp Subsidiaries.

Specific terms that were considered unfair included:-

1. There was an automatic renewal of the small business contracts which allowed Servcorp to increase the price at its absolute discretion and without notice.

2. Permitted Servcorp to unilaterally terminate the contract and limit the small business's termination rights.
3. Unreasonably limit Servcorp's liability and/or imposing unreasonable liability on the small business.
4. Allowed Servcorp to terminate a contract where a claimed breach may not have constituted a material breach and without giving notice to the small business or the opportunity to remedy the claimed breach.
5. Permitted Servcorp to retain a small business's security deposit without notice if the small business failed to request its return.

The ACL was extended with effect from 12 November 2016 to cover "standard form contracts" (Section 27 ACL) involving "small business contracts" (Section 23(4) ACL). Interestingly, the Federal Court considered contracts that although originally entered into prior to the commencement of the extended provisions of the ACL, the contracts had been renewed after that date and were therefore subject to the ACL.

Section 23(4) of the ACL states:-

*"A contract is a **small business contract** if:*

- (a) the contract is for a supply of goods or services or a sale or grant of an interest in land; 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; and*
  - (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."*

The final outcome of the case is that orders were consented to by the parties that Servcorp and its subsidiaries, at their own expense, would:-

- (a) Establish and implement a program which has the purpose of ensuring compliance with the ACL with the program terms being agreed between ACCC and the subsidiaries.

- (b) That Servcorp employees and agents would participate in the program.
- (c) Pay costs of \$150,000 to the ACCC on account of costs of and incidental to the proceedings.

This is now the second case in recent times in which the ACCC has initiated and won proceedings involving the protection of small business in dealing with standard form contracts and the imbalance of power by larger organisations. See [Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd \[2017\] FCA 1224](#).

Accordingly, small business owners may wish to consider their positions in a range of industries including franchising, shopping centre leases and supplier agreements. The imbalance in bargaining position between large or multinational organisations and small businesses has been apparent for some time but it would appear that the amendments to the ACL have merit and that the regulator is willing to act.

**Date Published: 17 August 2018**

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