

Navigating Commercial & Employment Landscapes in 2024

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Commercial Considerations

- ✓ Client engagement strategies
- ✓ Unfair contracts regime
- ✓ Leasing tips and common pitfalls

Client Engagement: How to get it right

- Contracting with the correct entity:
 - The agreement must correctly name the parties. A business or trading name is not sufficient. Consider whether your customer is a sole trader or a company.
 - An ABN/ACN search can confirm this.
 - Ensure correct execution – Corporations Act or other authority
 - How can the agreement be accepted/entered by the customer?

Client Engagement: Terms

- When properly drafted and used, forms a legally binding agreement between you and your customer governing the supply of your goods or services.
- Timing – ensure your contract/terms are provided to your customer before you begin to supply any goods or services.
- The terms should be the entire agreement governing your relationship with your customer.



Client Engagement: Terms

- What else should the terms cover?
- The basics:
 - Ordering
 - Description of what is to be supplied
 - Payment terms
 - Variations
 - Delivery

Client Engagement: Terms

Other considerations

- Security for payment: director guarantees; bank guarantee
- Retention of title/ownership of goods
- Express warranties, returns, defects
- Limitation of liability
- Termination and breach
- Jurisdiction



Unfair Contract Terms Regime

What is the Unfair Contract Terms Regime?

- Found in the *Competition and Consumer Act 2010 (Cth)*.
- Applies where customers are consumers or a party is a small business. The regime therefore applies to B2B contracts, so can certainly apply to you.
- Applies where parties use a standard form contract.
- Unfair terms – significant imbalance in the parties' rights and obligations; not reasonably necessary to protect legitimate interests; and would cause detriment.

Unfair Contract Terms Regime

Standard form contracts

- Typically prepared by one party on a “take it or leave it” basis.
- Presumption of standard form contract unless other party proves otherwise.
- Court will consider bargaining power and opportunity to negotiate more than minor changes, and history of use of the same contract.
- Negotiating your contract can actually work to your advantage as it will remove application of the regime.

Unfair Contract Terms Regime

The changes:

- Broadened application by expanding the meaning of small business.
- Removed contract price as a threshold to application of the regime.
- Introduced substantial civil penalties.
- Court also able to make orders for damages, vary or voiding contracts and injunctions.



Leasing Tips and Common Pitfalls

What to consider:

- Speak to a lawyer before signing a terms sheet or heads of agreement.
- Consider insurance and security requirements – liaise with your broker and financier to ensure you can meet those requirements.
- Term and option – are you guaranteed a further term? Make sure dates are not missed.
- Use – What are you intending for the premises? What consents to you need?

Leasing

- Ending the Lease – consider the costs now, document any agreement regarding make good and keep a record of the condition of premises.
- Does the Retail Leases Act apply?
 - Disclosure requirements
 - Lodgement of bond
 - Tribunal to hear disputes



Employment Considerations

- ✓ Flexible workplace solutions
- ✓ Closing Loopholes Act
- ✓ Recent cases

Flexible workplace solutions

Statutory right to request:

- Parents
- Carers
- Disability
- Domestic violence

Flexible workplace solutions

Reasonable business grounds:

- Cost
- Other employees
- Practicality
- Loss of efficiency
- Impact on customer service



Flexible workplace solutions

Process:

- Response within 21 days
- Must have a discussion
- Employee can refer to FWC
- FWC powers

Closing Loopholes Act

Labour hire:

- Same job same pay when providing labour (as opposed to service)
- Enterprise agreement
- Small business exception



Closing Loopholes Act

In force:

- Wage theft
- Union delegates
- Small business redundancy

Closing Loopholes Act

Further suggested amendments :

- Casuals
- Contractors and the gig economy
- Unfair contracts
- Right for employees to disconnect from the workplace



Cases of interest

Sydney Trains:

- Random drug testing
- Positive to cocaine
- Didn't impair employees performance
- Zero tolerance policy was not enough
- Must consider employee's individual circumstances
- Employee was reinstated



Cases of interest

Janala Pty Limited v Hardaker:

- Court upheld a noncompete restraint of 6 months
- Went to a competitor
- Dealt frequently with customers, quoted jobs, negotiated contracts
- Access to customers and pricing information
- Information was treated confidentially at workplace - not all employees have access to sensitive database information
- Length of time depends on how long it takes a reasonably competent replacement to establish rapport with customers



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Thank You!

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