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Wake-up call for big business

ROBERT GOTTLIEBSEN THE AUSTRALIAN JANUARY 4, 2016 8:28AM

Former treasurer and prime minister Paul Keating nailed it last week when he said: “As the nature of the workforce has changed we have not changed with it.”

He was talking about the failure of the ALP to gain support from the self employed. The same applies to the unions. Yet in 2015, as a result of unrelenting pressure from *Business Spectator* and Independent Contractors Australia chief Ken Phillips, the Coalition, the ALP, the Greens and the cross benches combined in the Senate to revolutionise small enterprise contracting in Australia.

In the opening months of this year, the Australian Competition and Consumer Commission will be deploying a taskforce to contact large companies and government organisations seeking to examine their contracting practices.

My guess is that most of Australia’s top 500 companies and vast areas of the public service will have contracts in breach of the new unfair contracts act. They have until November 2016 to rewrite hundreds of thousands of “unfair” contracts and change the way they do business in large areas of their operation.

In the weeks leading up to the Christmas break, I was staggered by the number of large companies that did not understand the ramifications of the unfair contracts legislation on their business.

It seems the top companies believed they had neutralised the unfair contracts proposals that the Coalition government had taken to the 2013 election. The big companies and public service had done a deal with Tony Abbott’s Prime Minister’s Office and Peta Credlin, whereby the legislation was limited to contracts worth less than \$100,000 over one year, which made the proposed legislation totally useless and it would have minimal impact on big businesses or the public service.

The plan was that if the legislation was rejected by the Senate, then the proposal would then be dropped. The government would then blame the Senate for not honouring its promise. The former small business minister, Bruce Billson, was left to “sell” what he must have known was a breach of the government’s promise.

Large companies then happily put the whole “unfair contracts thing” out of their mind and did not read much more about it, including the extensive articles I wrote in Business Spectator explaining how the Senate gave the government legislation teeth and, with the change of prime minister, the government agreed with the Senate changes.

Just before Christmas, I was in the company of the IT managers of one of the large banks. Their eyes just goggled when they realised that almost all their contracts would need to be changed because they had not been negotiated and had features that were in clear breach of the act.

I explained to the IT managers that they had almost 12 months to change their contracting ways but if those contracts were still in place in November 2016, they would be void and have no effect. The IT managers asked for copies of my articles and realised there was a lot of work to be done. I think the full ramifications of this legislation will not be understood by large corporations until well into February and March next year. Then there will be a scramble to get exemptions for various industries.

If new Small Business Minister Kelly O’Dwyer does her job, there will be few exemptions. If she is forced to cave in, then the Senate is on red alert. The ALP, the Greens and the crossbenchers are ready to throw out most exceptions, so she will need to present a very good case to allow an industry to continue to issue unfair contracts.

The vast majority of large corporations and government departments simply issue standard form contracts to businesses employing less than 20 people on a “take it or leave it” basis. Most of these contracts have been prepared by lawyers and middle managers with no interest in fairness.

Almost all these standard-form contracts will therefore be in breach of the act, assuming they are under \$300,000 for those spanning less than 12 months and \$1 million for those contracts extending beyond 12 months. If the contract has been truly negotiated, the act does not apply.

Standard form small business contracts are set to be declared “unfair” if they give one party (but not the other) the ability to:

— Avoid or limit the performance of the contract.

— Terminate the contract.

~~Apply penalties against the other party for a breach or termination of the contract~~

- Apply penalties against the other party for a breach or termination of the contract.
- Vary the terms of the contract.
- Renew or not renew the contract.
- Vary the price payable under the contract without the right of the other party to terminate the contract.
- Unilaterally vary the characteristics of the goods or services to be supplied under the contract.
- Unilaterally determine whether the contract has been breached or to interpret its meaning.
- Limit one party's vicarious liability for its agents.
- Permit one party to assign the contract to the other party's detriment without their consent.
- Limit one party's right to sue the other party.
- Limit the evidence one party can adduce in legal proceedings in respect to the contract.
- Impose the evidential burden on one party in legal proceedings in respect to the contract.

Essential reading is the ACCC website, and for the background, [my commentary](#) and that of [Ken Phillips](#), executive director of Independent Contractors Australia. Phillips prepared the above list of “dos and don'ts”.