



Unfair Contract Laws – Small Business

Take effect November 2016



Unfair Contract Terms – Small Business

Have you checked your terms? The new unfair contract laws take effect Nov 2016.

New laws are about to take effect which will directly impact standard form business-to-business (B2B) contracts, such as T&Cs for the supply of goods or services which are in standard form (i.e. offered on a 'take or leave it' basis).

The new laws address the imbalance between small and large businesses. Any term that is considered 'unfair', will be severed from the contract and, in the most severe cases, the entire contract could be rendered void. Such protection was previously only available to consumers and applicable to consumer contracts. The new laws are a significant step aimed at helping small business.

When do the changes take effect?

The new unfair terms provisions will apply to:

- contracts entered into after 12 November 2016; and
- any varied or renewed terms to a standard form contract made after 12 November 2016.

What contracts are impacted?

The new laws are applicable to standard form small business contracts. A small business contract is:

- a contract for the supply of goods or services or sale of land;
- at the time the contract is entered into, at least one party is a business that employs less than 20 employees (not including casual staff unless employed on a systematic/regular basis); and
- the upfront price due under the contract is not greater than \$300,000 (or if the contract term is more than 12 months the contract price does not exceed \$1 million).

Relevant factors

The following factors may indicate a contract is a standard form contract:

- one party has all or most the bargaining power;
- the contract was drafted before the parties discussed the transaction;
- the contract is offered on a 'take it or leave it' basis;
- there was only a slight opportunity to negotiate the terms of the contract;
- the contract has not been tailored for that particular transaction.

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What is an unfair term?

There are three key questions to be considered:

- Does the term in the standard form contract cause a significant imbalance?
- Is the term not reasonably necessary in order to protect the business interests of the relevant parties?
- Does the term cause any detriment to either the consumer or small business owner?

EXAMPLES

Some examples of unfair terms may include:

- a term that allows a party to unilaterally vary the terms of the contract (e.g. change prices or services);
- automatic rollover clauses (i.e. where one party may automatically renew the contract with the small business' consent);
- a term that allows a party to terminate the contract without cause and require the small business to pay liquidated damages equal to the service fees for the remaining period of the agreement;
- where the small business has no right to refund of deposit where it has terminated the contract because of the other party's breach;
- limited liability clauses which limit the small business' ability to recover for loss caused by the other party's negligence; and
- a term that allows a party to unilaterally determine whether the contract has been breached or to interpret its meaning.

What to do Now/Next?

If you are a small business (or you contract with small businesses), you should seek a review of your standard form contracts and T&Cs before the new legislation takes effect.

In particular, have you considered whether any of your terms might be unfair? If so, what impact will the new laws have on your contracts going forward?

Need help

See below for our contact details.




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