



BUSINESS | Issue No. 14 | *New Unfair Contract Terms Requirements*

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Anyone who enters into contracts with small businesses should be aware that from 12 November 2016 those contracts will be subject to new “fairness” requirements.

Standard form

The legislation which takes effect from 12 November 2016 provides that any Unfair Contracts which are offered by a party in a standard form and entered into (including varied or renewed) after that date may be caught. A standard form contract is one that has been prepared by one party and offered to the other on a ‘take it or leave it’ basis.

What is considered unfair?

If a term is deemed “unfair”, it will be void and not binding on either party.

Terms will be regarded as unfair if they:

- cause a significant imbalance between the parties;
- are not reasonably necessary to protect the legitimate interests of a party; and
- cause financial or other detriment (such as delay) to a small business.

In deciding whether a term is unfair, it is necessary to consider how transparent the term is, as well as the overall rights and obligations of each party under the contract.

A term will be transparent where it is easily seen and read, expressed in plain language, and not phrased in legal, complex or technical language in fine print. However, it is still possible for a term that is transparent to be found to be unfair.

It is necessary to consider the fairness of a particular term, in light of the contract as a whole. Other terms may “offset” the term which at first appears to be unfair if there are other benefits contained in the contract.

It is not an offence to include an unfair term in a small business contract. However, remedies including damages may apply if a party endeavors to enforce an unfair term.

Examples of unfair terms

Examples of terms that may be unfair include those which:

- enable only one party to avoid or limit their obligations or liability under the contract;
- permit only one party to renew or terminate the contract;
- penalise one party (but not another) for breaching or terminating the contract;
- enable only one party to vary the terms of the contract without consulting the other.

Threshold requirements

The changes will apply to small business contracts where:

- they are for the supply of goods or services or the sale or grant of an interest in land;
- at least one of the parties is a small business which employs less than 20 people. Casual staff employed on a regular basis will be included in that head count; and
- the amount payable (upfront price) under the contract is no more than \$300,000 if the contract is for less than 12 months, or \$1 million if the contract is for more than 12 months.

What should businesses do?

Businesses should be doing the following (preferably before 12 November):

- Review standard form contracts and make any necessary changes so that terms which were previously valid are not void under the new law.
- Consider another way of structuring terms to protect a party's rights without a term being unfair. The term might be reasonable or justifiable and if so the rationale could be documented.
- Consider the wording of the contract (ensure it's clear and does not include jargon) and its presentation (ensure it's not in fine print).
- Review the end of term (including termination) and variation rights in the existing terms.
- Consider whether relevant contracts fall within the thresholds.
- Consider whether staff need to be trained in relation to the negotiation of contracts so that they are aware of the risks.
- It may be prudent for some businesses to maintain records to indicate where contract terms have been varied. This will show that they are not always offered on a take it or leave it basis.

The new regime will begin on 12 November and will apply to all agreements entered into from that date, regardless of whether or not the agreements have been reviewed and amended to remove any unfair provisions.

Businesses should be aware that they may lose some rights if their standard form agreements are not revised (if necessary) as they will be unable to enforce any provisions which are considered to be unfair.



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