

## Article Information

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## 'Unfair Contracts' - How will the new law affect your Business?

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The Australian Consumer Law contained within the *Competition and Consumer Act 2010 (ACL)* and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* provide protection to consumers from unfair contract terms in certain business-to-consumer transactions.

The Federal Government has now extended such protection to small businesses in certain business-to-business transactions through the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* which amends the ACL and the ASIC Act.

### Affected contracts

The new laws will apply to small business contracts where a standard form contract has been prepared by one party and the other party has had little or no opportunity to negotiate the terms, i.e., "take or or leave it" contracts.

The new laws apply to contracts entered into or renewed on or after 12 November 2016. Where a contract is varied on or after this date, the new law will apply to the varied terms.

A small business contract is where:

1. it is for the supply of goods or services or the sale or grant of an interest in land;
2. one of the contracting businesses employs fewer than 20 persons (which may or may not include casual employees depending on the circumstances); and
3. either:
  1. the upfront price payable under the contract does not exceed a net price of \$300,000; or
  2. the contract has duration of more than 12 months and the upfront price payable under the contract does not exceed a net price of \$1,000,000.

For example the new law will potentially affect contracts such as telecommunications contracts, finance contracts, gym contracts, consultancy agreements, hire agreements, motor vehicle rental agreements, utility agreements leases of land, agistment agreements and licences to occupy land.

The Australian Competition and Consumer Commission (ACCC) has already advised that it will carry out compliance activities specifically in the following areas:

- franchising;
- retail leasing;
- advertising services;
- telecommunications services; and
- independent contracting.

Shipping contracts, constitutions of companies, managed investment schemes or other kinds of bodies and certain insurance contracts are not considered small business contracts.

## **Unfair contract terms**

A term may be considered 'unfair' by the courts if it:

- causes a significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- causes financial or other detriment (such as delay) to a small business if it is relied on.

The following are some examples of what may constitute an unfair contract term:

- terms that enable only one party to avoid or limit their obligations under the contract;
- terms that enable only one party to terminate the contract;
- that penalise only one party for breaching or terminating the contract; and
- terms that enable only one party to vary the terms of the contract.

## **How will the changes affect businesses?**

A business that is a party to a contract and/or regulators (such as ACCC and ASIC) can apply to the court for a term of the contract to be declared void on the basis of it being unfair with the result that the term is unenforceable.

Where a court declares a term void, the remainder of the contract will continue to bind the parties. If a party seeks to apply or rely on a term that has been declared void by a court, the court may grant an injunction, order for redress or any other order the court considers appropriate.

Prior to entering into or renewing an agreement, we recommend engaging a lawyer to check whether your business' standard form contracts contain unfair contract terms.

Whilst we have broadly addressed the changes to the law in this article, it should be kept in mind that this legislation is quite complicated and could potentially have a detrimental effect on businesses and consumers alike.

If you require more information in relation to the legislation or you require assistance in reviewing your contracts, please contact Piper Alderman and we can discuss this with you.