

There are changes happening!

Significant changes are set to shake up the law of Unfair Contract Terms in small business standard form contracts.

The changes come into effect on 9 November 2023 and will introduce serious penalties for businesses that use and rely on unfair contract terms while also expanding the class of contracts that are captured by the current unfair contract term regime.

The changes have implications for a wide range of contracts including inter-business contracts, small business loan contracts, construction contracts and more. Businesses that use any kind of standard form contract must take stock and review existing contracts to identify any unfair contract terms in a bid to minimise the risk of penalty under the new laws.

What is an unfair contract term?

An unfair contract term is a term that causes a significant imbalance in the parties rights and obligations, which is not reasonably necessary to protect the legitimate interests of the party advantaged by the term while causing detriment to a party should the term be relied upon.

Common contract terms or clauses that are susceptible to being declared unfair include:

Entire Agreement	A contract term that excludes pre-contractual occurrences (statements, correspondence or behaviour) from being binding or enforceable.
Right to Termination for Breach	A contract term that limits the right to terminate of one party in instances of an immaterial breach, and denies that party a chance of remedy.
No Right to Refund of Deposit	A contract term that denies a party of a right to a refund of a deposit in circumstances where the offending party has not met their obligations.
Late Payment Fees	A contract term that imposes an unreasonably harsh penalty on one party for late payment.

When determining whether a term of a contract is unfair, the courts consider the contract as a whole as well as the degree of transparency inherent in the term itself.

What are the changes?

From November 2023, the law of unfair contract terms will expand to apply to all small business standard form contracts entered into where a contracting party employs fewer than 100 persons (increased from 20) or has an annual revenue of less than AU\$10 million. The contract value threshold no longer applies.

The law applies specifically to standard form contracts, that is, a contract that is prepared by one party and is offered on a 'take it or leave it basis'. Even where there has been an effective opportunity to negotiate and make minor or insubstantial changes to the terms of the contract, a standard form contract may still exist.

Significantly, the changes introduce penalties for parties found to be using unfair contract terms in standard form contracts, with penalties of up to AU\$2.5million for individuals or up to AU\$50million for a body corporate to apply. The courts can also extend orders of enforcement to existing or future small business standard form contracts entered into by the offending party.

The new laws effect contracts made on or after 9 November 2023 as well as existing contracts that are renewed or varied on or after 9 November 2023.

What does it mean for you?

With the new laws set to take effect in November 2023, we have entered a transition period giving businesses time to re-examine their standard form contracts to ensure there are no unfair contract terms thereby minimising the risk of pecuniary penalty under the new laws and ensuring existing contracts remain enforceable.

We encourage all clients utilising standard form contracts to make an appointment to review and health check your businesses standard form contract document and to discuss the changes to the law of unfair contract terms and its implication on your business.

For more information please contact [Miles Anderson](#) or your usual ClarkeKann contact.