



## UNFAIR CONTRACT PROVISIONS AND SMALL BUSINESS

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On 20 October 2015 the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* passed both houses of Parliament. This means that the unfair contract term provisions set out in the Australian Consumer Law and *Australian Securities and Investment Act 2010* (Cth) will now also extend to small businesses. Therefore, moving forward, if you operate a small business (as defined below) or contract with small businesses then it is important to consider these provisions when drafting and negotiating standard form contracts.

### IS MY BUSINESS A SMALL BUSINESS?

A business will be classified a “small business” if it has less than 20 employees.

### WHAT CONTRACTS WILL THE LAWS APPLY TO?

The legislation applies to contracts with small businesses which meet the following conditions:

- a standard form contract - where the terms and conditions of a contract are set by one party and employ standard provisions (typically there is no negotiation);
- the value of the contract is either:
  - \$300,000 or less; or
  - \$1,000,000 or less and the contract has a duration of more than 12 months.
- the contract relates to the provision of goods and services (including financial products or services) or sale or grant of an interest in land.

### WHEN WILL A TERM BE “UNFAIR”?

Typically, unfair terms in a contract are ones which:

- would cause significant imbalance in the parties’ rights and obligations;
- are not reasonably necessary to protect the legitimate interests of the advantaged party; and
- would cause detriment to the other party (either financial or non-financial) if they were enforced.

In determining whether a term is unfair, consideration will also be given to the fairness of the term in the overall context of the contract and how transparent (or easy to understand) the term is.

### REMEDIES FOR AN UNFAIR CONTRACT TERM

If a small business considers that a contract to which it is a party contains an unfair term, then it can commence court proceedings.

The powers of the court in such proceedings include setting aside and/or varying part or parts of a contract and, in the case of contracts involving the provision of products, directing a party to repair or refund a product.

The risk of a court finding that a particular term is “unfair” is increased if the advantaged party has significantly more bargaining power than the small business. Regulatory authorities such as the ACCC and ASIC may also commence proceedings on their own volition.

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## WHAT DOES IT MEAN FOR ME?

If you are a small business owner – consider the new provisions when negotiating standard form contracts with your suppliers. If you are a supplier to small businesses:

- consider whether your contracts with small businesses fall within the definition of “standard form”;
- review your standard form contracts for any potential unfair terms. If you consider that a particular term may be unfair, then you should think about how important that term is to your business and whether it does in fact serve to protect your legitimate business interests; and
- consider whether you need two sets of standard form contracts – one for small businesses and another for your other business customers.

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