



Unfair contract terms – now applicable to small business contracts (from 12 November 2016)

Participants in the building and construction industry are reminded that the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) will commence operation on **12 November 2016**. The Act makes amendments to the Australian Consumer Law (ACL) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). The amendment extends the already established nullification of unfair terms in consumer contracts under the ACL and ASIC Act to contracts with small businesses.

The Act is intended to address the potential for unfair detriment where unfair contract terms are enforced against small businesses. The protections will work in the same way as those that currently exist under the Australian Consumer Law and ASIC Act for standard contract terms, whereby a provision may be declared void by a court. In these circumstances, the voided term is unenforceable, while the remainder of the contract will continue to be binding to the parties, if the remainder of the contract is capable of operating without the unfair term.

An application to a court for a declaration that a term is void may be made by a party to the contract, or a regulator (for example ASIC or the ACCC).

What type of contract does the amendment affect?

The amendments in the Act apply to standard form small business contracts made or varied after 12 November 2016. The protections will therefore apply to terms in a standard form contract that, at the time it is agreed to:

- at least one party employs fewer than 20 people (**small business**)*; and
- where the value of the contract does not exceed \$300,000 for contracts up to one year, or \$1,000,000 for contracts lasting for more than one year.

*Please be aware that in Western Australia the amendments will not fully apply until the WA ACL is updated. Provided the party insisting on the unfair term in the standard form contract is an incorporated business action may be taken by the small business from 12 November 2016.

What is a standard form contract?

Standard form contracts are those which employ standardised, non-negotiated terms and are prepared by one party to the contract. Factors that are relevant to determining whether the contract is standard form include:

- whether one party has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party, in effect, was required either to accept or reject the terms of the contract in the form in which they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract; and
- whether the terms of the contract were tailored to the specific circumstances of the agreement between the parties.

What is an unfair contract term?

An unfair term is a term that:

- causes a significant imbalance in the parties' rights and obligations under the contract;
- would cause detriment (financial or otherwise) to party if it were to be relied on; and
- is not reasonably necessary to protect legitimate interests of the party who would be advantaged by the term.

A court will read the term(s) in the context of the entire contract and will also take into consideration the transparency of the contract, that is, how upfront, easy to read and clearly presented the contract is to the affected party.

Importantly, a term that defines the main subject matter or sets out the upfront price of a contract, or a term that is required by law, **cannot** be declared unfair.

Examples of unfair contract terms

Contract terms have been cited as unfair where they:

- require one party to bear the risk of a high cost, low probability event;
- create an automatic rollover extension of the contract;
- allow one party to unilaterally vary the contract;
- affect or remove the ability of the other party to vary the contract terms, limit their obligations, terminate or renew the contract;
- levy excessive fees;
- impose excessive interest rates on outstanding moneys; or
- affect or limit a party's ability of redress or remedies for breach by the other party.

Further information

Further information about the Act can be accessed at www.accc.gov.au/business/business-rights-protections/unfair-contract-terms.

Information specific for and pertinent to small businesses can be accessed from the Small Business Development Corporation (SBDC) website at www.smallbusiness.wa.gov.au/business-in-wa/about-sbdc/media-centre/what-s-happening/unfair-contract-terms.

A free webinar is available to view at www.accc.gov.au/update/new-unfair-contract-terms-law-free-webinar.

Disclaimer

The information contained in this bulletin is provided as general information only and should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations you should obtain independent legal advice.

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