



## Unfair contracts regime now applies to both consumers & small businesses

***As from November 2016 the unfair contract term protection laws have been extended to contracts that are defined as a “small business contract”.***

The Competition and Consumer Acts have since 2010 provided protection to consumers from unfair terms in circumstances where they have little or no opportunity to negotiate with businesses, such as with standard form contracts. The intent of the legislation is to level the playing field and prevent “take it or leave it” standard form contracts, which are commonly one-sided, from including unfair terms.

A ‘**consumer contract**’ is a contract for the supply of goods and services or the sale or grant of an interest in land to an individual who acquires it wholly or predominately for person, domestic or household use or occupation (a consumer). Examples of standard form consumer contracts are gym membership contracts, internet and phone plan contracts, electricity supply contracts.

Although there is no express definition of a standard form contract, a standard form contract generally includes situations where:

- one party has all or most of the bargaining power relating to the transaction;
- one party prepared the contract before discussions between the parties;
- one party was required to either accept or reject the contract as presented;
- one party was not given the opportunity to negotiate; or
- the terms of the contract are not specific to one party or the particular transaction.

A contract will be presumed to be a standard form contract unless a party proves otherwise.

A ‘**small business contract**’ is one where:

- the contract is for the supply of goods, services or a sale or grant of an interest in land;
- at the time at which the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- the upfront price payable on the contract is no more than \$300,000 (or \$1 million if the duration of the contract is more than 12 months).

Examples of a small business contract could be retail leases, supply agreements, franchise agreements and finance contracts.



The regime will not only apply to new small business contracts, but also pre-existing small business contracts which are renewed, and to the terms of pre-existing contracts which are varied.

## What is an unfair contract term?

A term of a contract is unfair if it:

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

The legislation sets out some examples of unfair contract terms, including terms that:

- allow one party to unilaterally vary, renew or terminate the contract;
- penalise one party for a breach or termination of the contract;
- allow one party to vary the upfront price under the contract without the right of the other party to terminate the contract; and
- allow one party to unilaterally determine whether the contract has been breached.

## Who can enforce this law?

The ACCC and state and territory consumer protection agencies share responsibility for the enforcement of the unfair contract protections in relation to consumer goods and services. ASIC is responsible for enforcing the protection in relation to financial products and services.

You can also take your own court action or go to a tribunal to enforce your rights under the law.

## What remedies are available?

A consumer or a small business which is a party to the contract may seek orders which include order:

- that a term is unfair;
- that severs the unfair term from the balance of the contract;
- that the whole, or any part of the contract is void;
- varying the contract from a specified date;
- refusing to enforce any or all of the provisions of the contract;
- the return of property, or refund its value;
- repair of goods or resupply of services; or
- for payment equal to the loss or damage.



## What should business do?

Small businesses should be aware of these new rights and the remedies that are available to them. Companies which deal with small businesses should review their standard terms of trade to ensure that they do not include unfair terms. This might include:

- examining whether the company utilises standard form contracts;
- assessing the extent to which standard form contracts are entered into with businesses which employ less than 20 people and which fall within the upfront price thresholds;
- identifying existing contracts which might be renewed after the commencement of the new regime; and
- reviewing any standard form contracts to identify terms which might be deemed “unfair” and considering whether they should be amended.

## Conclusion

Both consumers and small businesses who enter into standard form contracts have important and enforceable rights. Businesses should review their standard form contracts immediately to minimise the risk of key contractual terms being found unenforceable.

*If you or someone you know wants more information or needs help or advice, please contact Michael Battersby or Ken Gray on 02 4731 5899 or email [commercial@batemanbattersby.com.au](mailto:commercial@batemanbattersby.com.au).*