

Article Information

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Do your standard form contracts fit the new regime?

From 9 November 2023 a new penalty regime and legal consequences will apply to unfair terms in standard form contracts with small businesses and consumers. Laws regulating the use of unfair contract terms already exist, but the scope and severity of these laws are expanding.

Under the new regime, the maximum penalties for corporations found to have used unfair contract terms will be the greater of:

- \$50 million;
- three times the value of the benefit obtained from the unfair contract term; or
- where the value of the benefit cannot be determined, 30% of the adjusted turnover during the turnover period in which the breach occurred.

Further to address the ‘mischief’ of unfair contract terms, the courts also have the power to void, amend or refuse to enforce part, or the entirety of, contracts containing unfair contract terms.

The protection against unfair contract terms will now be extended to include **potential** (as opposed to only actual) damage caused by the unfair term and extended to situations where unfair terms are used across a suite of standard form of contracts used by a business, where the court may order that all of the ‘offender’s’ other contracts containing the unfair term/s, are void, must be amended or that a particular clause may not be enforced across all such contracts.

An unfair contract term is typically one that causes unreasonable or unnecessary imbalance between the parties’ rights and obligations. This can include clauses not reasonably necessary to protect the party’s legitimate interests and otherwise cause, or may cause, financial or other detriment to the other party if it were relied upon.

Unfair contract terms are of interest in the context of **standard form contracts** with **consumers** and **small businesses**.

A **standard form contract** is a template contract containing a set of repeatedly and commonly used terms and conditions, used by companies including builders, developers, head contractors and consultants, amongst others, as a time and cost-effective option when contracting with other parties. These avoid the cost of negotiating bespoke terms and conditions every time the business enters a contract. Often, they are put to the other party on a “take it or leave it” basis, with only minor changes able to be made to the terms and conditions.

A **consumer** of goods for purposes of the unfair contract terms regime is a person (whether a natural person or a corporation) who acquires goods in circumstances where:

- the amount paid for the goods is no more than \$100,000; or
- the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- the goods consist of a vehicle or trailer acquired for use principally in the transport of goods.

There are some exceptions.

A **consumer** of services is a person who acquires the services in circumstances where the amount paid for the services are no more \$100,000 or the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

A **small business contract** is any contract where one party has less than 100 employees or less than \$10 million in turnover in their last income year, thus including most subcontractors, suppliers and consultants in the construction industry.

Some examples of contract terms identified by the courts to date as being potentially unfair include those which:

- give rise to an imbalance between the parties' rights and obligations;
- are not necessary to protect a party's legitimate interest in a contract or project;
- could cause significant financial or other detriment to a consumer or small business owner;
- allow one party but not the other party to limit their liability under the contract;
- allow one party but not the other to terminate the contract;
- penalise one party but not the other for breaches of the contract;
- allow one party but not the other to renew the contract;
- allow one party to vary the contract without permitting the other to terminate;
- allow one party to vary the price of goods or services without the other party's consent.

There are potentially many other terms that may be considered unfair.

It seems likely that your business adopts standard form contracts for your projects. Given the changes, effective from 9 November 2023, it is imperative that your standard form contracts are reviewed by a qualified professional (usually a lawyer) to confirm that they do not contain terms that are unfair. If you are unsure about the new laws, you should seek appropriate legal advice.

Ideally your standard form contracts should be reviewed and amended by the commencement date of the new regime (9 November 2023), so it is required as a matter of some urgency.

We can assist with this review process and are currently doing so with many of our clients. We would be happy to also assist you with your standard form contracts in a timely manner.

Please contact us to discuss your suite of standard form contracts so that we can identify those that require review, and possibly amendment, to avoid the consequences of the new regime.