

Article Information

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Do you have standard contracts which may have unfair terms? The ACCC has you in their sights

The ACCC recently filed proceedings against Fuji Xerox Australia alleging that a number of standard form business contracts contain unfair contract terms.

Standard form contracts for the supply of goods or services where:

- one of the parties is a small business (being a business that employs less than 20 people); and
- the upfront price payable under the contract is no more than \$300,000 or \$1 million if the contract is for more than 12 months,

are subject to the unfair contracts regime in the Australian Consumer Law.

In a Notice of Filing against Fuji Xerox Australia Pty Ltd and a related company (**FXA**), the Australian Competition and Consumer Commission (**ACCC**) has sought declarations that 31 different terms in nine standard form contracts are unfair under the Australian Consumer Law and therefore void. ACCC is also seeking an injunction to prevent FXA from relying on the unfair terms or entering into future contracts that contain those terms and an order for a corrective notice, compliance program and costs.

The Notice of Filing sets out ten grounds on which terms in the FXA contracts should be declared unfair:

1. **Unilateral Variations** - the contracts contain terms permitting the unilateral variation of prices and other terms without notice and without any corresponding rights for FXA customers to reject or negotiate the variations or terminate the contracts without penalty;
2. **Automatic Renewal** - the contracts provide for automatic renewal unless the customer gives notice to cancel the contract within a specified period where FXA is not required to give any notice of the imminent rollover deadline;
3. **Extraneous Documents** - the contracts reference and impose obligations from other contracts that FXA is not required to provide to the customer, thereby imposing obligations of which the customer may not be aware;
4. **Limited Liability** - the contracts limit the liability of FXA to the customer or require the customer to indemnify FXA including where FXA or their agent or contractor has caused or contributed to the loss or damage;
5. **Disproportional Termination Terms** - the contracts permit FXA to suspend or terminate the contract for minor breaches where no corresponding right is given to customers;
6. **Termination Payments** - the contracts provide that if FXA terminates the contract, the customer must pay a termination amount unilaterally determined by FXA where such amount may be disproportionate to the loss suffered by FXA as a result of the termination;
7. **End of Contract Terms** - the contracts provide that following the minimum term, the customer must either retain the equipment and pay FXA the shortfall between the residual value and the market value as determined by FXA and that title in the equipment and parts does not pass to the customer at any time;
8. **Irrevocable Offer** - the contracts require the customer to make an irrevocable offer to FXA on signing the contract but FXA is not bound by the contract until the customer is advised of unconditional acceptance of the contract or the support services commence;
9. **Non-reciprocal Provisions** - the contracts contain terms which impose obligations on the customer or grant rights to FXA without any corresponding obligation being imposed on FXA or right being granted to the customer; and
10. **Unfair Payment Terms** - a number of the contracts contain payment obligations which arise irrespective of whether FXA provides the relevant goods or services.

In its response to ACCC filing the action, FXA has issued a statement advising that it intends to defend the proceedings,

that it has co-operated with ACCC's investigation since 2018 and that in its view, ACCC did not meaningfully engage with FXA in relation to its response submitted earlier this year.

Under the Australian Consumer Law, businesses are not currently prohibited from including or relying on unfair contract terms in dealings with consumers and small businesses and although the courts can declare unfair terms to be void, they cannot presently impose penalties on companies using these terms. However, in multiple media releases, the ACCC has stated its intention to lobby for the Australian Consumer Law to be amended to make it illegal for businesses to include or rely on an unfair contract term and for the Courts to have the power to impose penalties where businesses use and benefit from unfair contract terms.

If you regularly use standard form contracts that fall within the criteria for the unfair contracts regime, you should proactively review your contracts to ensure compliance with the requirements of the unfair contracts provisions of the Australian Consumer Law. Similarly, if you propose to become a party to a standard form contract, you may be able to use the unfair contracts provisions to assist you to negotiate more favourable terms in the contract.

If you would like us to review your organisation's standard form contracts or you are a purchaser of goods or services subject to a standard form contract and would like assistance to negotiate amendments to the contract, please contact [Sarah Johnson](#).