

Commercial Insights

Proposed reforms to strengthen the unfair contract term regime in standard form contracts under the Australian Consumer Law

The *Treasury Laws Amendment (enhancing Tax Integrity and Supporting Business Investment) Bill 2022* has been introduced into Federal Parliament and, if passed, is designed to strengthen and expand the operation of the unfair contract term regime within the Australian Consumer Law. The Bill follows a review which found that the current regime was ineffective in deterring unfair conduct.

The Bill, if passed, seeks to introduce financial penalties. Under the current regime, a term in a standard form contract which is found to be unfair is only deemed to be void.

The Bill also seeks to expand the reach of the unfair contract term regime over small business standard form contracts by redefining small businesses to include businesses with less than 100 employees (an increase from 20 employees as is presently the case) or businesses which have an annual turnover of less than \$10 million. It is proposed that there no longer be a contract value threshold to invoke the unfair contract term regime but rather, the regime be applied to all small business contracts.

The strengthened regime, if passed, is likely to have a significant impact for those businesses who are accustomed to using standard form contracts which may contain terms that are unfair.

Meaning of unfair

A term of a consumer contract or a small business contract is unfair if:

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

In determining whether a term of a contract is unfair, a court must take into account such matters as it thinks relevant but must take into account the following the extent to which the term is transparent and the contract as a whole.

A term is transparent if the term is expressed in reasonably plain language and presented clearly.

It is up to the person or party who claims that the unfair term is reasonably necessary to protect its legitimate interests to prove that the term is necessary. Otherwise, the term will be presumed to not be reasonably necessary.

The aim of the unfair contract term legislation is to prevent the abuse of standard form contracts which, by definition, have not been individually negotiated.

The current regime

Under the current regime, a “small business” contract is one in which one of the parties is a business with less than 20 employees and the price of the contract is less than \$300,000, or less than \$1 million if the contract term exceeds 12 months.

The proposed new regime

Under the proposed new regime, the definition of small business will be expanded to include parties which employee less than 100 employees and have an annual turnover of less than \$10 million. The contract value threshold for small businesses under the Australian Consumer Law will no longer apply.

Under the new regime, businesses using standard form contracts containing unfair contract terms will now attract financial penalties. The maximum pecuniary penalty per contravention for companies will be the greater of \$10 million, three times the value of the benefit obtained, or 10% of the annual turnover for the previous 12 months. For individuals involved the maximum penalty will be \$500,000.

It is proposed that once a term in a contract is determined by a court to be unfair, the court may make orders to prevent or reduce loss or damage that may be caused by the unfair term. It is not necessary for the aggrieved party to establish that it has suffered loss or damage.

What the changes mean for business

The proposed changes, if passed, will affect a range of businesses and in particular, those that use standard form contracts and deal with either individual consumers or businesses with less than 100 employees. The broadened scope of the regime and, in particular, the introduction of financial penalties will mean that the use of standard form contracts is significantly riskier, especially if it is arguable that the standard form contracts may contain unfair terms.

If the proposed regime is adopted, there is likely to be a grace period to enable businesses to review their practices.

What you need to do

We suggest that businesses should immediately review any standard form contracts that are presently in use.

Standard form contracts used for individual consumers, should be reviewed in order to identify whether they contain unfair contract terms and, if so, these terms should be addressed.

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The use of standard form contracts for “small businesses”, as defined in the proposed new regime, should also be reviewed to identify any unfair contract terms and these terms should be addressed.

This article was written by Principal Douglas Raftesath. For advice about the new unfair contract term regime, assistance in reviewing standard form contracts, and to ensure you understand your business obligations, please contact our corporate and commercial Principals Douglas Raftesath, Mark Fitzgerald or Georgina Odell.



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