

All's Fair in Contracts and Law? Unfair Contract Protection for Small Business

Small Business Contracts that are standard form and which are entered into or varied after 12 November 2016 will be subject to new amendments under Australian Consumer Law.

What are Small Business Contracts?

For the purposes of the legislation, Small Business Contracts have three elements:

1. They are for the supply of goods or services or the sale or grant of an interest in land;
2. at least one of the parties to the contract is a business which employs fewer than 20 people; and
3. the contract has an upfront price of less than \$300,000, or less than \$1 million if the contract is for more than 12 months.

What are Standard Form Contracts?

Standard form contracts include the following elements:

1. One party has all the bargaining power;
2. One party prepared the contract;
3. The contract was offered on a 'take it, or leave it basis'; and
4. There was no opportunity for negotiation.

What is the effect of the amendments?

Small business contracts that are standard form are now subject to laws regarding 'unfair contract terms' that were previously only available to consumers.

What are 'unfair contract terms'?

Under Commonwealth Australian Consumer Law, a contract term is unfair if:

1. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

2. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
3. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The legislation usefully lists examples of the type of terms that may meet the above criteria, prominent amongst those examples are terms which apply to one party to the contract, but not the other.

For example:

1. Term that permits one party and not the other to avoid obligations or limit the performance of the contract – UNFAIR
2. Term that permits one party but not the other to terminate the contract - UNFAIR

What is the remedy for an unfair contract term?

If the contract consists of a standard form contract offered by one party to the other, then the unfair term or terms can be rendered void. If the contract as a whole is not capable of operating without the unfair term or terms then the whole contract can be rendered void.

If you have a standard form contract used in numerous instances in your business that is found to have a term which is void or the whole contract is rendered void, the effect could be potentially very costly because that will apply to all instances where that standard form contract is used by your business.

Why do builders need to know about this legislative amendment?

Small business and standard form contracts are to say the least prevalent in the construction industry, particularly in the residential market. Many industry transactions meet the definition of small business contract, and will now become amenable to legal review for 'unfairness', not just building contracts but sub contracts, consultancy agreements, material purchases and plant hires

Assessing how the amendments will work in practice will require professional legal advice, the legislation contains clarifications and exclusions, but ultimately what courts and tribunals will consider 'unfair' will be a matter for case law and experience.

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