



PEER LEGAL ALERT: SMALL BUSINESS UNFAIR CONTRACT TERMS REGIME - ARE YOU AWARE OF YOUR RIGHTS AND RESPONSIBILITIES?

Key take-aways

The regime applies to eligible contracts entered into (including renewals and variations) after 12 November 2016.

A term of a small business contract is void if the term is unfair and the contract is a standard form contract.

A small business contract is a contract for goods or services where at least one party to the contract employs less than 20 people and the upfront price in the contract does not exceed \$300,000 or, for contracts with a duration of more than 12 months, \$1,000,000.

A contract term is unfair if:

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

A court may take into account such matters as it thinks relevant but must take into account the extent which the term is transparent. Transparency means whether the term is:

- expressed in reasonably plain language;
- legible;
- presented clearly; and
- readily available to any party affected by the term.

When drafting contracts, remember:

- rights without a corresponding right for the counterparty could be problematic;
- how the contract is presented matters (eg the size of the font or how easy it is to find);
- the interaction between clauses matters in potentially increasing the unfairness;
- plain English drafting matters; and
- terms can still be unfair even if they are transparent.



Recent examples

In recent cases^[1], a number of standard clauses were held to be unfair, including:

- **Automatic renewal clause** where the renewal term was the same as the term of the agreement and there was no obligation to inform about the automatic renewal.
- **Variation of services and price** allowing one party to unilaterally vary the services provided and the charges, with no requirement to provide notice, act reasonably or consult with the client.
- **Agreed times clause** where a party had protection for not completing services at required times, absolving that party of performance obligations and requiring customers to assume risk of non-performance.
- **Unlimited indemnity clause** in favour of one party even where loss is not the fault of the counterparty or could have been avoided or mitigated by the first party.
- **Deposit clause** which provides no obligation on one party to return the deposit or provide notification of forfeiture of deposit.
- **Notice clause** allowing one party to determine if it has been served by having to provide a confirmation of receipt. The corresponding service clause did not have this requirement.
- **Termination clause** giving the right to terminate without cause or compensation on one month's notice and a very limited termination right for the counterparty.

[1] Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224 and Australian Competition and Consumer Commission (ACCC) v Servcorp Ltd [2018] FCA 1044.



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