



INFORMATION SHEET

WORKPLACE SERVICES

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NAT- NEW BUSINESS TO BUSINESS (B2B) UNFAIR CONTRACT LAWS

In the modern marketplace, a large number of both commercial and consumer transactions involve the use of standard form, pre-printed contracts. Without them an inordinate amount of time, money and effort would be wasted negotiating the tiny details of ordinary transactions.

There are however laws in place surrounding the use of standard form documentation.

Since 2010 the Australian Consumer Law (ACL) has prohibited businesses from including “unfair” contract terms in standard form contracts offered to consumers. Essentially the laws were introduced to protect consumers from one-sided provisions used in the “take it, or leave it” documentation associated with mobile phone services, car rentals and gym memberships .

From **12 November 2016** these laws will also apply to contracts offered to small business.

This will impact on some standard form business to business (B2B) documentation used in the residential construction industry, including

- Subcontract (trade contract) agreements;
- Lower value commercial works contracts;
- Terms of trade;
- Agreements for the supply of building materials;
- Equipment leases; and
- Consultancy and professional services agreements.

Who do the laws apply to?

Previously these laws only applied to contracts offered to owners/consumers.

The unfair contract term protections will also apply to **standard form** small business contracts entered into or renewed from 12 November 2016:

- where at least one of the parties is a 'small business' and
- the upfront price payable under the contract is less than \$300,000, or is less than \$1 million if the contract runs for more than 1 year.

In looking at whether a contract is in “standard form”, factors include whether it was prepared in advance, the opportunity of the small business to negotiate its terms and the parties’ bargaining power.

A **small business** is defined as **one that employs fewer than 20 people**, including casual staff employed on a regular and systematic basis.

Importantly the law will apply to small business dealing with other small businesses.

DISCLAIMER - The above is intended to provide general information in summary form. The contents do not constitute specific advice and should not be relied upon as such. Formal specific advice should be sought by members with respect to particular matters before taking action.

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When is a contract term unfair?

There are a number of factors a Court will look to in deciding whether a term is unfair, including:

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

Importantly, the main subject matter of the contract or the upfront price of a contract (ie the contract price or project fee) **cannot** be declared unfair.

Examples of possible unfair terms

The legislation contains a list of terms which might be considered to be unfair. The list includes:

- where only one party has to vary the contract or avoid or limit its performance;
- rights to terminate that sit with one party and not the other;
- where one party has the power to determine the meaning and interpretation of a contract; and
- clauses that have the effect of penalising one party for a breach.

Contract terms that are written in fine print or are phrased in legal jargon are also more likely to be considered as unfair.

What do the unfair contract laws do?

The laws enable courts to declare that certain terms in a small business contract are "unfair". The term would then be void and unenforceable.

Whilst it not an offence to include an unfair term, the Court can award compensation against businesses seeking to use it.

The ACCC will also hear complaints from small business and may, in some instances, litigate on their behalf.

What should members be doing now?

HIA's suite of standard form contracts, including its trade agreements, are being considered against the new laws. Although there will be some updates we do not expect to introduce many significant changes. HIA's documentation has been drafted over a number of years to reflect long standing industry practice and provide for a balanced allocation of risk between the parties.

For members who have prepared their own standard form contracts we recommend that they review their documentation against the new laws and consult their solicitor.

Further information is also available on the ACCC website <http://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>.

Should you require further information, please contact a Workplace Advisor on 1300 650 620.