

# Article

## CORPORATE & COMMERCIAL



# Are You Ready?

## Time is running out to review your contracts for unfair terms

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From 12 November 2016, existing unfair contract term protections for consumers will be extended to standard form small business contracts due to amendments to the *Competition and Consumer Act 2010* (Cth) (**Act**).

Businesses who either contract with small businesses, or who are small businesses should review their contracts for terms which may be *unfair*, as these terms will not be legally binding if a Court ever determined that they are *unfair* within the meaning of the Act.

To assist, DW Fox Tucker has developed a basic checklist to determine whether you may be affected:

Preliminary Questions	Y	Notes
1. Is the contract dated: a. after 12 November 2016; or b. renewed or varied after 12 November 2016?	<input type="checkbox"/>	
2. Is one party to the contract a <b>small business</b> ?	<input type="checkbox"/>	<i>A small business is a business that employs fewer than 20 persons. This 20 person calculation does not include casual staff, unless they are employed on a systematic and regular basis.</i>
3. Is the contract <b>standard form</b> <sup>1</sup> ?	<input type="checkbox"/>	<i>Consider whether:</i> - one party has all or most of the bargaining power; - the contract was prepared by one party before transaction discussions; - one party was required, in effect, to accept or reject the contract; - one party was not given an effective opportunity to negotiate terms; and/or - terms do not take into account specific characteristics of the transaction.
4. Is the contract <b>upfront price</b> : a. \$300,000 or less; or b. \$1,000,000 or less if the contract is for more than 12 months.	<input type="checkbox"/>	<i>The contract upfront price is the consideration provided for the supply of the contract and is disclosed at or before the time the contract is entered into.</i>  <i>This does not include any other contingent consideration or interest that may be payable.</i>
5. Is the contract not <b>exempt</b> ?	<input type="checkbox"/>	<i>For example, company constitutions, managed investment schemes and insurance contracts are exempt.</i>
6. Is the contract for: <b>a. a financial product or financial services</b> <sup>2</sup> ; or <b>b. a supply of goods or services or a sale or grant of interest in land</b> ?	<input type="checkbox"/>	<i>For example, a financial product is a facility through which a person makes a financial investment, manages financial risk or makes non-cash payments, e.g. credit contracts, insurance contracts and mortgages.</i>  <i>For example, a financial service includes the provision of financial product advice, dealing in a financial product or the operating of a financial market.</i>

- This is not as simple as it sounds, as even in circumstances where a standard form contract is presented, there are different levels of negotiation of those terms that may ultimately take place.
- If the contract is for financial services or a financial product, then the unfair contract provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) will apply rather than those in the *Competition and Consumer Act 2010* (Cth). However, the unfair contract term protections are essentially identical in the two Acts.

Continued overleaf ....

If you answered yes to each question, you should consider whether the contract contains terms which are deemed *unfair*.

A term is *unfair* if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term (*Note: A term is presumed not to be reasonably necessary unless that party proves otherwise*); and
- it would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon.

Further, in determining whether a contract is *unfair*, you must take into account:

- the contract as a whole; and
- the extent to which the term is transparent (*Note: a term is transparent if the term is in reasonably plain language, legible, presented clearly & readily available to any party affected by the term*).

Ultimately whether a term is *unfair* requires legal expertise and judgment. This is especially as you must consider the contract as a whole and every contract has been entered into in a different context. It may involve the weighing up of competing issues. Therefore we strongly recommend that legal advice be sought if there are any concerns as to whether a term of the contract may be *unfair*. However, some examples of terms which may be deemed *unfair*, as provided by the Australian Competition and Consumer Commission include:

### 1. **A right to unilaterally vary the contract**

*A term of the contract provides the right for the company to change its prices or services at any time without prior notice to the small business. The small business does not have the right to terminate the contract, even if, for example, the company significantly increases its prices or services.*

### 2. **Automatic rollovers**

*Despite a 12 month term of the contract, a term in the contract has the effect of automatically renewing for a further 12 months unless the small business gives written notice that it does not wish to renew the contract before the initial term expires. Under the contract, the small business must pay a significant fee if it wishes to terminate the contract early.*

### 3. **Rights to terminate without cause plus damages**

*The contract provides that the supplier may terminate the contract any time by giving the small business 30 days' notice. Another term of the agreement provides that, if the agreement is terminated, the small business must pay the supplier damages equal to the service fees for the remaining period of the contract.*

### 4. **Limited liability**

*A term of the contract states that the company accepts no liability for any loss, including loss arising as a result of the company's negligence.*

### 5. **Wide indemnities**

*The contract contains a term that requires the small business to indemnify the other business against all loss and damage, including loss or damage caused by the other business.*

All *unfair* terms will be **void** and will not be legally binding. The contract can, however, continue to bind the parties if it can operate without the term.

We encourage any businesses who either contract with *small businesses*, or who **are small businesses** to review their contractual arrangements leading up to 12 November 2016 and where necessary seek comprehensive legal advice.

To view our previous article which details the changes, please see <http://www.dwfoxtucker.com.au/2016/02/1233/> or contact us for further information.



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