

Extension of unfair contract terms regime to business contracts – Are your standard terms fair?

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The unfair contract terms regime could soon be extended to business-to-business contracts. The [Fair Trading Amendment Bill](#), which proposes to introduce a new prohibition on unfair contract terms in standard form small trade contracts, is now before a Parliamentary select committee.

The select committee is currently accepting submissions, which are due by 27 March 2020. This means that it is time for businesses to start to consider the potential implications of the proposed new law, including:



Which of your contracts will be affected by the changes?

It is proposed that the new regime will apply to 'standard form small trade contracts'. Small trade contracts are defined based on whether the contract forms part of a trading relationship that exceeds an annual value threshold of \$250,000 when the relationship first arises.

The new provisions will therefore apply to standard form contracts (eg, contracts that are offered on a 'take it or leave it' basis or are not subject to negotiation) between parties who are in trade, where the value of the trading relationship is less than that threshold. This could include, for example, standard terms and conditions or terms of trade that you apply to business customers or suppliers. Examples of standard terms that have been subject to scrutiny under a similar prohibition in Australia include franchise agreements, telecommunications contracts, retail leases, independent subcontractor agreements, waste management terms, and supply agreements in the agriculture sector.

In some cases, it may not be straightforward to work out whether a contract is covered, as part of the test proposed for whether a relationship exceeds the value threshold includes whether, at the time when the first contract of the relationship is entered into, \$250,000 or more is "more likely than not to become payable under the relationship, in relation to any annual period". In addition, if you use standard terms that apply to business customers or suppliers who fall both above and below the threshold, you will need to consider whether to have separate terms for small trade contracts or update your terms to apply to all customers/suppliers.



What changes might need to be made to your standard terms?

As the unfair contract terms regime has been in place for consumer contracts for some time now and Australia has a similar regime, there is useful guidance available about the types of terms likely to be problematic. Examples of terms that could raise issues are:

- Broad limitation of liability or indemnity terms – eg, terms that require a smaller party to indemnify the larger party for all loss, even if the loss is caused by the larger party
- Terms that allow one party to increase prices or vary terms to the detriment of the other party, without any ability for the disadvantaged party to terminate the contract
- Automatic rollover terms that are not adequately disclosed
- Terms that allow one party to terminate the contract for any breach (including trivial breaches), without giving the other party an opportunity to remedy the breach
- Early termination charges.

To reduce the risk of terms being unfair, amendments could be made to high risk terms to make them less one-sided, and more reasonable and transparent.

What happens if a

If the Commerce Commission has concerns about a term being unfair, it could seek a



term is unfair?

court order declaring that the term is unfair. A term may be declared to be unfair if it:

- Would cause significant imbalance in the parties' rights and obligations under the contract
- Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term
- Would cause detriment to a party if it were applied, enforced, or relied on.

Currently, penalties under the Fair Trading Act only apply if a term has been declared to be unfair and is subsequently included in a contract or relied on. However, the Government has indicated that the enforcement regime is currently part of a broader review and changes to strengthen the regime could be introduced in future.



When will you need to make changes?

The new prohibition is unlikely to come into force before late 2021 (as the select committee's report on the Bill is not due until 12 August 2020 and it is currently proposed that the new prohibition will come into force one year after the Bill is passed). With the select committee's report due shortly before the general election, it could be some months after the select committee reports back before the Bill is passed.

However, we recommend that you start to consider the potential implications of the changes now, so that you can take them into account as you make any changes to your standard business contracts.

The Bill also proposes to introduce a general prohibition on 'unconscionable conduct' that will apply to conduct by businesses in relation to both consumers and other businesses. Unconscionable conduct is described in the explanatory note to the Bill as "serious misconduct that goes far beyond being commercially necessary or appropriate", which indicates that a relatively high threshold will apply before conduct is found to be unconscionable. The change is based on an equivalent prohibition in Australia, where there have been unconscionable conduct cases against a variety of conduct (including sales strategies targeting vulnerable consumers, the handling of customer complaints about product quality issues, and conduct by a supermarket in dealing with suppliers).

For further background about the changes, see our [November 2019](#) and [February 2019](#) updates.

If you would like any assistance in considering the potential implications of the changes or reviewing your standard terms to identify changes that may be required, please contact one of our consumer law team members.

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