

Time to review your standard form business-to-business contracts

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The Fair Trading Amendment Bill passed its third reading on 10 August 2021 and is about to become law. It extends the unfair contract terms regime to standard form small trade contracts, and introduces a new prohibition on unconscionable conduct as well as some changes to uninvited direct sales. We expect the bill to receive Royal Assent next week. This means the provisions will come in to force in mid-August 2022, giving businesses a year to get ready for the changes.

The provisions remain largely the same as in our last updates [here](#) and [here](#).

Now is a good time to examine your standard terms to consider the potential implications of the extension of the unfair contract terms regime. It also provides a good opportunity to do a more general review of your standard terms to make sure they're still fit for purpose.

What should you be doing?

Our recommendations for the steps your business should be taking are:

1. Identify the standard form business-to-business contracts that your business uses
2. Assess whether your trading relationships with the likely counterparties to the contracts fall under the \$250,000 annual threshold
3. Seek legal review of the terms to assess whether they may include unfair contract terms.

Step One: Identify the standard form business-to-business contracts that your business uses

The test for whether a contract is standard form is based on whether the contract has been subject to effective negotiation between the parties (eg whether it is a 'take it or leave it' contract). It is worth emphasising that the legislation could apply not only to standard terms and conditions or terms of trade that you put in place with your business customers but also any standard terms that you make your suppliers sign up to.

The new regime will apply to contracts entered into before the new regime comes into force if they are varied or renewed after the date that it comes into force (and are not subject to a longer transitional period provided for insurance agreements under the Bill).

Step Two: Assess whether your trading relationships with the likely counterparties to the contracts fall under the \$250,000 annual threshold

The new provisions will apply to standard form contracts between parties who are in trade, where the value of the trading relationship is less than the annual value threshold of \$250,000 when the relationship first arises. The value of the trading relationship will be based on when the first contract of the relationship is entered into (with the relationship including that contract and any other contract or prospective contract between the same parties on the same or substantially similar terms). This means that some contracts will remain subject to the unfair contract terms prohibition even if they later fall over the value threshold after an increase in the annual amount payable over time.

If you use standard terms that apply to business customers or suppliers who fall both above and below the annual value 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.

To determine whether a contract forms part of a 'trading relationship', the Bill as introduced required an assessment of related party contracts in considering whether the threshold was met. However, this was removed through a Supplementary Order Paper, which will make the assessment of the relationship more straightforward in some cases.

Step Three: Seek legal review of the terms to assess whether they may include unfair contract terms

A term may be unfair if it would cause a significant imbalance in the parties' rights and obligations arising under the contract; is not

reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

It is important to review the contract as a whole, as well as the transparency of a term, to determine whether a term is unfair.

Examples of terms that may be unfair include:

- Unilateral variation or termination terms (eg terms that allow one party to increase prices without any ability for the other party to terminate the contract, or that allow one party to terminate for trivial breaches without providing an opportunity to remedy the breach)
- Broad liability limitations or indemnities
- Automatic renewal terms that are not adequately disclosed
- Early termination fees.

It is also worth considering whether you want to only amend the clauses most likely to fall foul of the legislation or use the opportunity to more generally update your terms (for example, to make them more palatable and/or easy to understand and apply).

Examples from across the ditch

Cases from Australia (which has a similar prohibition on unfair contract terms in some business to business contracts) provide an indication of the types of terms that could also raise issues in New Zealand. Examples include:

Industry	Examples of terms declared to be unfair
 <p>Banking</p>	<p>Terms in loan contracts that:</p> <ul style="list-style-type: none"> • Provided an indemnity in favour of the bank that meant the customer would be liable for losses that the customer had not caused but which were caused by the bank's mistake, error or negligence, and/or could have been avoided or mitigated by the bank • Gave a bank broad discretion to unilaterally vary the terms of the contract without giving the borrower advance notice, or an opportunity to exit the contract without penalty • Allowed the bank to take disproportionate actions in response to a breach by the borrower, for example, by calling a default without giving the borrower an opportunity to remedy the breach, or by calling a default based on events that did not present any material risk to the bank.
 <p>Agribusiness</p>	<p>Terms in a contract between a potato wholesaler and potato growers that allowed the wholesaler to:</p> <ul style="list-style-type: none"> • Unilaterally determine or vary the price it paid growers for the potatoes • Unilaterally vary other contractual terms • Declare potatoes as "wastage" without a mechanism for proper review • Prevent growers from selling potatoes to alternative purchasers, even where the purchasers may have been willing to buy potatoes rejected by the wholesaler.
 <p>Waste Management</p>	<p>Terms in a waste management company's standard form contracts that:</p> <ul style="list-style-type: none"> • Bound customers to subsequent contracts unless they cancelled the contract within 30 days before the end of the term • Allowed the company to unilaterally increase its prices (with no right for the customer to terminate the contract), and charge for services not rendered (even when caused by reasons beyond the customer's control) • Provided an unlimited indemnity in favour of the company.
 <p>Property</p>	<p>Terms in a contract for serviced office spaces that allowed the supplier to:</p> <ul style="list-style-type: none"> • Unreasonably limit its liability or impose unreasonable liability on the customer • Unilaterally increase the price and terminate the contract • Keep a customer's security deposit if the customer did not request its return.

More recently, the Australian Competition and Consumer Commission (ACCC) has taken proceedings in respect of terms used in contracts by a supplier of printing goods and services. There has not yet been a decision in the case, but terms that the ACCC has alleged are unfair include some of the types of terms outlined above, as well as:

- Extraneous documents terms, which impose obligations from other documents that the supplier is not required to provide to the customer
- Disproportionate termination terms, permitting the supplier to suspend or terminate the contract for minor breaches with no corresponding right for the customer
- Non-reciprocal obligation terms, which impose obligations on the customer or grant rights to the supplier without any corresponding obligation being imposed on the supplier or rights being granted to the customer.

There have also been a number of instances where Australian regulators have raised concerns about certain terms with specific businesses and industries, and businesses have amended their terms in response. We expect that a similar approach will be taken in New Zealand.

Other changes to be aware of

The Bill introduces two further key changes:

- A general prohibition on 'unconscionable conduct' that applies to conduct by businesses in relation to both consumers and other businesses. Unconscionable conduct has been described (in the explanatory note to the Bill) as "serious misconduct that goes far beyond being commercially necessary or appropriate". The prohibition is based on the unconscionable conduct prohibition in Australia, so cases from Australia will be drawn on in assessing whether certain conduct may raise issues under the new prohibition. Based on the experience in Australia and the description of unconscionable conduct in the Bill, a relatively high threshold is likely before conduct is found to be unconscionable.
- Making it easier for consumers to require uninvited direct sellers to leave or not enter their property, including through the use of generally worded written notices.

If you would like any assistance in considering the potential implications of the changes or reviewing your standard terms more generally, please contact one of our [consumer](#) and [commercial](#) law experts.

Visit our practice pages

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