

Australia extends its unfair contract terms regime

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In a notable development across the Tasman, Australia has extended its unfair contract terms regime to small businesses contracts. A small business contract is a standard form contract where, at the time it is entered into:

- At least one party is a 'business' that employs less than 20 persons
- The contract's 'upfront price' does not exceed either \$300,000 (or \$1 million if the contract term is more than 12 months).

The Australian unfair contract terms regime is, in many ways, similar to the New Zealand equivalent in our Fair Trading Act. For example, both countries deem terms to be unfair if they cause significant imbalance in the parties' rights and obligations, aren't necessary to protect the benefiting party's legitimate interests, and would cause detriment to a party if relied on. Both countries also have similar lists of example terms that may be held to be unfair (eg terms permitting a party to unilaterally vary essential terms, or terms entitling only one party to terminate the contract).

However, the Australian regime focuses on the nature of the customer: until the recent change outlined above, such a customer had to be an individual (not a business). By contrast, the New Zealand regime focuses on the nature of the goods and services bought, specifically goods and services that are ordinarily acquired for personal, domestic, or household use or consumption (ie consumer products).

This means that, as a starting point, New Zealand's unfair contract terms laws already apply to businesses (large and small) buying consumer products, provided that they do not resupply them in trade, or consume them in a production or manufacture process.

Some commentators have argued that New Zealand's laws should include specific protections for small businesses in New Zealand entering into any arrangements where they have little leverage and there is no scope to change the terms and conditions presented. That is, arrangements that relate to matters other than consumer products. Examples might be franchise agreements or some software agreements for business customers. It will be interesting to see how successful the Australian regime extension proves to be and whether it gains support here.

If you're supplying goods or services in Australia to small businesses, you should review the standard form contracts you use. Even if the Australian changes aren't specifically relevant to you, it's important to remember:

- The unfair contract terms provisions of our Fair Trading Act apply to standard form consumer contracts, including those entered into by businesses. You can't contract out of these provisions
- These provisions apply not just to paper terms and conditions but also online contracts. And they don't just apply to kettles and gym subscriptions but a wide range of goods and services (the first Australian case involved the terms of an ISP service)
- It's always a good idea to regularly review your terms to ensure that they are current, transparent, and reflect what you're actually doing and the degree of risk actually faced by your business.

This article was written by Amy Ryburn, partner in our TMT team, for the [IITP Techblog](#) (2 December 2015). The original can be found [here](#).

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