

UNFAIR CONTRACT TERMS PROTECTIONS EXTENDED TO SMALL BUSINESS

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Legal Briefings - By **Emily McConnell** and **Robert Prosser**

The unfair contract terms protections available under the *ASIC Act 2001* and the Australian Consumer Law have been extended to cover small business contracts.

SUMMARY

- The unfair contract terms protections available under the *ASIC Act 2001* and the Australian Consumer Law have been extended to cover small business contracts.
- The protections will be available to businesses with fewer than 20 employees that enter into standard form contracts valued at less than the prescribed threshold (\$300,000, or \$1,000,000 for contracts longer than 12 months in duration).
- The new laws come into force on 12 November 2016. The protections will not apply retrospectively, but will apply to contracts formed or renegotiated, and terms of existing contracts that are varied, on or after this date.
- Persons who offer contracts to small businesses will need to ensure the terms of those contracts comply with the unfair contract terms regime.

BACKGROUND

The *ASIC Act 2001* (ASIC Act) and the Australian Consumer Law (ACL) contain mirror regimes which protect consumers from unfair contract terms (UCT) in circumstances where they have little or no opportunity to negotiate those terms, such as with standard form contracts. The ASIC Act's requirements apply to financial services and products and the ACL applies to the supply of goods or services.

In May 2014 the [Commonwealth Government](#) began a consultation process which considered extending the UCT protections to small businesses. The proposed change was designed to address concerns that, like consumers, small business competes on an uneven playing field when dealing with other, larger businesses. In a legal briefing¹ published in July last year, we discuss the Government's proposal and options for reform.

Following the release of exposure draft legislation earlier this year, on 20 October 2015 the Commonwealth Parliament passed the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (Bill) amending the ASIC Act and the ACL to give effect to the extension.

THE NEW UCT REGIME

The amendments mean that the UCT regime will, from 12 November 2016, apply in respect of standard form contracts that are 'small business contracts'. A contract is deemed to be a small business contract if:

1. at least one party to the contract is a business that employs fewer than 20 persons, and
2. the upfront price under the contract does not exceed either \$300,000, or \$1,000,000 if the duration of the contract is more than 12 months.

The extended protections adopt existing concepts employed under the UCT regime, including:

- applying to a 'standard form contract'. In determining if a contract is a standard form contract a court may consider if there is unequal bargaining power, if the contract is prepared by one party prior to negotiations, is not subject to negotiation between the parties and is offered on a 'take it or leave it' basis, and
- relying on the concept of 'unfair'. Terms are 'unfair' where they cause a significant imbalance between the parties, are not reasonably necessary to protect a party's legitimate interests or would cause detriment to a party if relied upon.

The Government's consultation paper identified a number of ways in which to define small business contracts. The options included criteria based on the corporate characteristics of the parties, the value of the contract, the level of revenue generated by the parties or the number of employees employed by the parties. Ultimately, the Government has chosen to adopt a definition that incorporates both a transaction value threshold and an employee-based business size threshold. This approach is designed to limit the scope of the protections to businesses that are most likely to lack sufficient resources and bargaining power to protect their own interests when entering contracts.

The consultation paper also considered whether the protections should cover contracts where goods and services are acquired from small businesses as well as contracts for the supply of goods and services to small businesses. Consistent with most submissions that considered this issue, the new UCT regime covers contracts for both the supply and acquisition of goods and services.

IMPLICATIONS FOR BUSINESS

Persons who offer contracts to small businesses will need to assess the applicability of the UCT protections and ensure that, where necessary, the terms of those contracts comply with the UCT regime. The extended protections will not apply retrospectively but will apply to contracts formed or renegotiated after the date on which the amendments come into force.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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