

# Unfair Contract laws for Small Business

## Briefing Note August 2023

### 1. Overview Unfair Contract laws – small business

Unfair contract laws for small business people adapt unfair contract provisions for consumers to the small business situation. Application to small business started in 2016. The laws are administered/enforced by the ACCC and ASIC.

<https://www.accc.gov.au/about-us/publications/a-guide-to-the-unfair-contract-terms-law>

A review of the existing laws resulted in a 'beefing up' for small business, passed in 2022. The new laws start in November 2023.

The laws do not apply to government departments, only government owned businesses (eg., Australia Post). The laws need to be applied to all government department, authorities and entities. See (4) below for draft legislative change.

### 2. Summary of the 'beefed up' Small Business Unfair Contract laws

*The Act*

- *Expands the definition of small business.* To apply to businesses up to 100 full- or part-time employees (excludes casuals) or less than \$10m in turnover. Currently only 20 employees.
- *No limit on the value of the contract* (currently restricted to contracts up to \$300K).
- *A 'standard form' contract* is one if the contract has been used before.
- If *minor changes* have been made to a contract in negotiations this does not stop the contract being 'standard form.'
- *Imposes fines* for breaches (up to \$2.5m for individuals; \$50m for corporations). There are currently no fines.
- *A person breaches* the law if they propose to or seek to apply an unfair clause.
- *Multiple* unfair clauses create multiple breaches.

*Court orders* (This will close lots of loopholes in the current laws):

- If a clause has been declared unfair by a court, all similar clauses in other contracts are taken to be unfair. A party must disprove the unfairness if they want to use the clause.
- An order can be made to stop loss or damage from an unfair clause. Loss does not have to be proven but only that loss *may* occur. Such an order can apply to a 'class of persons' to stop loss.
- An order can be made to stop someone from engaging in contracts with unfair clause/s. A public warning can be issued about such a person.
- Persons can be disqualified from 'managing a corporation' due to use of unfair clauses.

Orders can be made within 6 years of a clause being declared to be unfair.

*The Bill/Act Is enforced* (proposed and currently) by the

- ACCC covering contracts for goods, services and sale of land.

- ASIC covering financial products & services and insurance contracts (This started in April 2021).

*Excluded clauses:* Any clause required by legislation is not 'unfair.'

From the Explanatory Memorandum:

The rebuttable presumption therefore acts as a disincentive for companies to reuse terms they know are likely to be considered unfair.

The rebuttable presumption is intended to encourage contract-issuing parties to maintain thorough monitoring and record keeping of their contracts to ensure that unfair terms are removed from or not included in standard form contracts.

### **3. Examples of unfair contract clauses**

The laws make it clear that a contract is 'unfair' if it gives one party, but not the other, the ability to:

- a) Avoid or limit the performance of the contract.
- b) Terminate the contract.
- c) Apply penalties against the other party for a breach or termination of the contract.
- d) Vary the terms of the contract.
- e) Renew or not renew the contract.
- f) Vary the price payable without the right of the other party to terminate the contract.
- g) Unilaterally vary the characteristics of the goods or services to be supplied.
- h) Unilaterally determine a breach or interpretation of the contract.
- i) Limit one party's vicarious liability for its agents.
- j) Permit one party to assign the contract to the other party's detriment without consent.
- k) Limit one party's right to sue the other party.
- l) Limit the evidence one party can adduce in legal proceedings in respect to the contract.
- m) Impose the evidential burden on one party in legal proceedings in respect to the contract.

### **4. Make government departments subject to unfair contract laws**

Currently the Competition and Consumer Act does not apply to any governments entities unless they are considered to be carrying on a business (eg., Australia Post).

In [2015, the Harper Report](#) recommended extending competition laws to all government entities. This did not occur. The following is a modification to a recommended Harper amendment to the CCA. This amendment would require all government entities (eg., departments, etc) to comply with unfair contract laws.

#### **Application of Act to Commonwealth and Commonwealth authorities**

(1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth **in relation to the unfair contract provisions of the Act** in so far as the Crown in right of the Commonwealth engages in trade or commerce, either directly or by an authority of the Commonwealth **with a small business**.