

# Changes to Australia's unfair contract terms regime are fast approaching

Last chance for businesses to review standard form contracts with small businesses for unfair contract terms before the new regime comes into effect on 12 November 2016

## Introduction

Following a 12 month transition period, the extension of Australia's unfair contract terms regime to deal with contracts with small businesses will take effect on **12 November 2016**.

The new regime will have significant implications for business-to-business transactions as certain contracts will now be subject to additional 'unfairness' protections.

Companies are at risk of terms contained in 'business-to-business' contracts, not previously regulated by the unfair contract terms regime, coming under scrutiny by the Australian Competition and Consumer Commission (**ACCC**) and small business counterparties for unfairness.

Where a term to a contract is declared 'unfair' it is void and will be unenforceable against the other party to the contract.

As such, companies should use the time before 12 November 2016 to ensure that their standard form contracts and operational procedures for interactions with businesses are compliant with the new legislation, both in their terms and how the terms are explained as part of contract engagement with the small business.

## Overview

The amendments to Australia's unfair contract terms regime are contained in the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (**Amendment Act**), which was given Royal Assent on 12 November 2015.

The Amendment Act provided for a transition period of 12 months, so that businesses would have the opportunity to review and, where necessary, amend any standard form contracts that would be regulated by the revised regime.

With the transition period drawing to an end, this briefing is a timely reminder to businesses to ensure that they have undertaken the appropriate due diligence in respect of their standard form contracts and implemented appropriate mechanisms to ensure compliance with the new regime from **12 November 2016** onwards.

To assist any further due diligence to be undertaken by companies in respect of their standard form contracts, this briefing revisits the types of contracts that will be covered by the new regime, and where terms may be considered unfair.

## Key issues

- The new unfair contracts regime for small businesses comes into effect on 12 November 2016, as the prescribed 12 month 'transition period' comes to an end.
- Companies should use the time remaining before 12 November 2016 to ensure that their standard form contracts and interactions with small businesses are compliant with the new regime.
- Large companies should review contract terms as well as their processes of contracting with small business, in particular how contracts are explained.
- Agreements entered into prior to 12 November 2016 will continue to be covered by the existing unfair contracts terms regime. However, importantly, the terms of standard form contracts entered into, renewed or varied after 12 November 2016, are likely to be subject to the new regime.

For a comprehensive overview of the key changes to the unfair contract regime, see our [previous briefing](#).

## What contracts will be covered under the new regime?

Currently, the unfair contract terms regime only applies to terms contained in standard form 'consumer contracts'. Consumer contracts are those entered into with individuals who are acquiring goods, services or an interest in land that are predominantly for **personal, domestic or household use or consumption**.

The new provisions for unfair contract terms will extend Australia's unfair contract regime to apply to **standard form contracts** entered into with **small businesses** where:

- the relevant contract is for the supply of goods and services, or a sale or grant of an interest in land;
- at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- the upfront price payable under the contract does not exceed **\$300,000** or, for a contract that has a duration of more than 12 months, the upfront price payable under the contract does not exceed **\$1 million**.

Our earlier briefing discusses the detail and relevant analysis to accompany each of these requirements.

Strictly speaking, terms contained in agreements that are entered into prior to 12 November 2016 will not be covered by the new regime. However

businesses should be mindful that if a particular agreement is **entered into, renewed, or a particular term is varied, after this date**, the terms of the agreement may be subject to the new regime.

## Are the terms unfair?

Where it is likely that an agreement is covered by the regime, businesses will then need to consider whether any terms in the agreement are unfair. Section 24 of the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act 2010 (Cth)) (**ACL**) sets out the meaning of 'unfair' as it applies to contractual terms covered by the unfair contract regime. Importantly, the principles of unfairness will not change under the new unfair contract terms regime.

It is broadly accepted that a term, contained in a regulated contract, will be considered unfair if it satisfies the following criteria:

- the provision provides for a significant imbalance in the parties' rights and obligations under the contract;
- the provision would cause detriment (financial or otherwise) if relied upon; and
- the provision is not reasonably necessary for the protection of the interests of the party advantaged by the term.

A term will be considered in the context of the contract as whole. The form and transparency of terms will also be scrutinised for unfairness. As such, terms should be drafted in plain English language, avoid ambiguities as well as omissions of relevant information.

By way of example, the ACCC considers terms to be unfair where they:

- allow one party to unilaterally vary, renew or terminate the contract;
- allow one party to unilaterally determine whether the contract has been breached or interpret its meaning;
- penalise one party but not another for breach or termination of the contract;
- allow one party but not another to avoid or limit performance of the contract; or
- limit one party's rights in respect of any proceedings related to the contract.

## Implementation of the new regime

It is envisaged that the new regime will operate in a similar manner to the current regime.

The ACCC and counterparties to a regulated contract can challenge the validity of terms contained in a contract under the new regime. It will ultimately be for a Court to declare a term as void, in taking into account the relevant considerations as outlined above. The ACCC has been active in enforcing the regime in relation to 'consumer contracts' and is expected to be just as active in relation to this new regime, especially given companies have had the benefit of a 12 month transition period to put their affairs in order.

As is currently the case, where a term is 'unfair', only the particular term will be considered void and, to the extent possible, the contract will continue to operate between the parties without the inclusion of the unfair term.

Unlike other provisions of the ACL, breach of the unfair contracts regime will not result in pecuniary penalties.

## Contacts

**Dave Poddar**

Partner

T: +612 8922 8033

E: dave.poddar  
@cliffordchance.com**Elizabeth Hersey**

Senior Associate

T: +612 8922 8025

E: elizabeth.hersey  
@cliffordchance.com**Mark Grime**

Associate

T: +612 8922 8072

E: mark.grime  
@cliffordchance.com

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[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Level 16, No. 1 O'Connell Street,  
Sydney, NSW 2000, Australia

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