



Unfair contract terms reforms effective from November 2023

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New and amended legislation, effective from November 2023 updates the unfair contract regime whereby it is illegal to use unfair contract terms in a standard form contract where one party is a small business.

This blog summarises:

- the unfair contract terms reforms for small business, in a nutshell;
- why you need to review any standard form contracts in use; and
- how to take the reforms into practice in your business or project.

What are the unfair contract terms reforms in a nutshell?

The reforms commenced on 9 November 2023 and are contained in the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

The protections against unfair contract terms in the [Australian Consumer Law](#) and the *Australian Securities and Investments Commission Act 2001*(Cth) apply to both small business and consumers.

The ACCC has also produced guidance on the applications of this new law, which is available [on the ACCC website](#).

There are three primary changes to unfair contract terms for small business

Definition of a small business

The definition of a small business is one that meets the following thresholds:

- employs less than 100 people; or
- for the last income year, has a turnover of less than \$10 million.

In theory, a small subsidiary of a large business could also be captured by the definition of a small business under recent legislative reforms (see details below).

Definition of a small business contract

The definition of a small business contract has now been expanded to apply to any contract for the supply of goods and services where at the time of entering into the contract, at least one of the parties is a 'small business' as described earlier.

Penalties for breaches of unfair contract terms laws

There are pecuniary penalties included with the reforms. They may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term. Presently, the available penalties include penalties against individuals and penalties against companies/businesses.

The court can also make other orders, including:

- to void, vary or refuse to enforce the contract if this is appropriate to prevent loss or damage that is likely to be caused; or
- injunctions.

What is considered a standard form contract?

In general terms, a standard form contract is the type that is put forward by one party and the other party does not usually have any scope to negotiate or amend the terms and conditions.

A contract may be determined to be a standard form contract despite there being an opportunity to:

- negotiate changes to the contract terms that are minor or insubstantial in effect;
- select a term from a range of options determined by another party; or
- negotiate the terms of another different contract or another proposed contract.

Any standard form contracts in use should be reviewed

It is crucial that any standard form contracts be reviewed following the reforms in the law.

These reasons apply whether you are the party that is providing the standard contracts or you are actually the 'small business' that the legislation is protecting through the reforms.

1. Simply put, it is now illegal to use unfair contract terms

If you are a small business and you are engaged to supply goods or services, there may be an imbalance in bargaining power between you and the party who is providing the standard terms. Your business could, therefore, be signing up to unnecessary risk.

These legal reforms are intended to boost your confidence when entering into standard form contracts, as there are now specific tests in place to help determine whether a certain contract term is unfair. With that knowledge, it is easier to push back on those terms which could be found to be illegal if tested in a court or tribunal.

1. You may be unwittingly breaking the law.

As part of the due diligence process of onboarding new suppliers or service providers, it is now imperative to establish whether you are dealing with a small business. This is especially the case if your business is the party that issues standard form contracts. A lack of awareness of who you are dealing with can cause problems down the road if there are unfair terms in your standard contracts.

1. Penalties are significant

As mentioned earlier, pecuniary penalties may now apply for breaches of unfair contract terms.

The maximum civil penalty for individuals is up to \$2,500,000.

The maximum civil penalties for companies and body corporates will be the greater of:

- \$50,000,000.00; or
- three times the value of any benefit obtained by using the unfair contract term; or
- where the value of a benefit cannot be calculated, 30% of the company's adjusted turnover during the period of the breach.

How to take the unfair contract terms reforms into practice in your business or project

1. Know your customers, suppliers, and contractors

Due diligence on the businesses you are engaging with is critical. If you have a due diligence process in place, it is a good time to review it. If you don't have one yet, we recommend:

- requesting your customers or suppliers or contractors to provide written information about their turnover and employee numbers; and
- implementing a regular review process to ensure that the information collected through the due diligence process is updated.

1. Review your contracts database

With all existing contracts, we recommend that you:

- take the opportunity to review the due diligence information when varying contracts or renewing agreements;
- identify all contracts that may be captured by the legal definition of “small business contracts”; and
- categorise your contracts database so that the standard form contracts are listed separately and dealt with under the regular review cycle.

1. Review and revise your standard form contracts

For some businesses, reviewing and revising any standard form contracts they have may require reviewing all their terms and conditions if they are likely to deal with small businesses.

Where it is possible to do so, the review can be narrowed down to only relevant contracts. Either way, the goal here is to amend or remove terms that may be considered unfair or borderline unfair clauses.

This includes ensuring that the contracts are:

- expressed in reasonably plain language;
- legible;
- presented clearly; and
- readily available to any party affected by the term.

1. Upskill your employees

Training your workforce empowers those within your business who are issuing or dealing with the negotiation and management of standard form contracts.

The recommended action plan includes:

- ensuring that there is a clear process in place in the business to deal with the negotiation and management of standard form contracts;
- maintaining records of negotiation of contract terms; and
- training the relevant staff on matters relating to standard form contracts, including:
 - the reforms to the unfair contract terms regime;
 - how to negotiate standard terms in line with the reforms;
 - consequences of not following the legislation.

Get help from a commercial lawyer

It is important for any business to acknowledge when they need external legal expertise.

Wambeti Legal works with clients who have standard contract terms and are interested in pursuing steps to ensure that their standard form contracts are not unfair.

We are also available to conduct training for personnel involved in aspects of contract management or negotiation of standard form contracts, to upskill them in this area of reform.

Contacting Wambeti Legal

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Further reading

- [Contract management in construction law](#)
- [Contract negotiation strategy](#)

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