



NOTE: This information was taken from the webinar hosted by ACCC titled:

**The new small business unfair contracts terms law: What you need to know and do now.
7pm 16th March.**

Safety In Industry take no responsibility for the accuracy of this information nor any reliance upon it. This information is a summary of the key points noted in the webinar for information purposes only.

The Youtube link to the webinar may be found at https://www.youtube.com/watch?v=2zc_LjLPYcw

What is an Unfair Contract Term?

Does the clause in the contract cause a significant imbalance to the rights of a party in the contract.
Eg. A clause that states that the contract can be varied by one party without consent from the other.

If there is an imbalance why is it there? Is it reasonably necessary to protect the business's interests.

If that clause is relied upon, will it be detrimental to one party?

The clause MUST be looked at in context and visibility / transparency before the contract was signed.

Terms that may raise concerns under the Unfair Contract (UCT) terms law.

There are 8 terms that the ACCC or ASIC may deem unfair.

- **Right to unilaterally vary the contract** – means that one party has the right to change part of the contract without agreement by the other.
- **Early termination fees / costs** – One party wanting to terminate a contract early and has to pay something as a result to do so. If the other party not wanting to terminate suffers a loss due to the termination then this may be justified. Consumer leases such as a lease for goods and services typically have this in contracts. ASIC get concerned when the termination fee is not visible or the party does not know it has been varied – ie unfair. Disclosure must be evident.
- **Limited / no liability clauses** – Instances of this are where a large company shifts all the liability across to a smaller party or restrict the legal rights by the smaller business to the larger business like suing the larger business. Eg a removalist company stating that they take no responsibility for ANY damage during a removal. However it can be readily seen that the removalists needs to take responsibility for the things they have control over.
- **Automatic roll over** – or automatic renewals. Contracts that roll over under new terms. Eg one party providing a large timeframe of notice in order to terminate.
- **Right to terminate agreement with no cause** – the right for one party to the contract to terminate the contract for any reason whatsoever or without a reason. It leaves one party not knowing where they stand or how to recover from it.
- **Liquidated damages** – moneys payable by one party to the contract to another party to the contract if the first party breaches the contract. Does the cost accurately reflect the real costs of the breach?
- **Wide indemnities** – is a promise to pay for loss, damage, injury etc. Where large business have a clause that states that the smaller party will indemnify the larger even if the larger business contributed or even caused the damage. This is very lopsided.
- **Forfeiture clauses** – is a clause that means one party to a contract can retain funds that are the funds of the other party in certain circumstances.



If clauses to contracts are found to be unfair.

If the court rule that a contract term is void, then it is treated as though it had never existed in the contract. ie not binding on both parties to the contract. This does not mean the remaining parts of the contract are void or unfair. If the party in question retains the clause in the contract then that could be deemed to be a breach under consumer law.

If this happens, the court can make application for an injunction seeking to stop the party using that term or the court can make an order relating to how that clause/term should be used in the agreement, or the court could deem how the term should be used in respect to the contract.

What contracts the new laws will apply to ?

Not all contracts are covered. There are a couple of qualifying conditions.

1. Applies to a Standard Form contract - see below
2. One of the business in the contractual arrangement must have less than 20 employees – see below
3. The contract amount must be less than \$300,000 and cover < 1year, or < \$1M if the contract spans more years than just 1 year.

It can apply to 2 small business, but generally it is between a large and small business.

1. What is a Standard Form Contract ?

Standard form means that : What genuine level of negotiation took place beforehand.

That is, was the contract offered on a 'take it or leave it basis', or where the small business doesn't have the chance to negotiate the terms.

2. How do you calculate less than 20 employees ?

The simple answer is do a head count. Casual employees are included where they are used regularly and on a systematic basis.

Do related companies need to be aggregated for the head count – No. The only head count are those in the entity forming party to the contract in question.

3. How is the contract price determined.

The contract price is the price disclosed up front at the time the contract was entered into for the goods and services compensated in the contract. Variations to the contract that could not be calculated with certainty usually won't be taken into the contract sum.

When will the laws apply ?

12th November 2016. If a new contract is entered into on or after this date then it is caught in the laws.

If an existing contract is in place and the contract is varied after the 12th November 2016 then it is the varied portion which gets caught in the new laws, not the entire contract.



If the contract automatically rolls over on or after the date, then the laws apply to the new contract.

If the contract is periodic (eg month by month basis) the laws only apply on or after the 12th November 2016.

What are the terms excluded from the new laws?

Exemptions are - Home insurance, car insurance, insurance schemes, shipping contracts, managed investment schemes and some other areas.

The minister can exempt some industries however there are none at this stage.

What should you do to prepare for the new laws?

You need to review your contracts now, particularly large businesses that undertake and sign small business into contracts.

If you are a small business, maybe look at when you want to sign or renew a contract either before or after the 12th November 2016.

When the law kicks in the ACCC will be reviewing 5 specific industries.

- a) Advertising
- b) Telecommunications
- c) Franchising
- d) Retail leasing
- e) **Independent contracts**

Where should I go if there is an unfair contract term in a Standard form contract ?

The first and most efficient approach is to sort it out together as the 2 parties to the contract.

ASIC and ACCC are there to maybe make some type of investigation, they do not act for individuals but look at issues that effect the greater populous. Unfortunately if the other party is unwilling to talk then you may wish to seek legal advice through the legal profession.

ASIC have a number of small business commissioners throughout Australia and or industry ombudsman could also be of assistance.

Need more Information?

www.accc.gov.au/uct

www.asic.gov.au/about-asic/what-we-do/laws-we-administer/unfair-contract-terms-law/unfair-contract-term-protections-for-small-businesses/