



IMMINENT CHANGES TO UNFAIR CONTRACT TERMS REGIME

October 2016

CHECKLIST

This checklist applies to 'small business contracts' (the key elements of which are set out in questions 1 to 3 below).

While this checklist has been prepared with small business contracts in mind, the questions relating to unfair terms will have application to 'standard form contracts' entered into with consumers which are already subject to obligations under the unfair contract terms regime in the CCA or ASIC Act.

Question	Answer
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Small business contract

If you answer 'yes' to all of questions 1 to 3, then the contract is a 'small business contract' and caught by the unfair contract terms law.

1	Is the contract a contract for the supply of goods or services (including a financial product or service), or a sale or grant of an interest in land?	<input type="checkbox"/>	Yes
2	At the time the contract is entered into, is at least one party to the contract a business that employs fewer than 20 persons? Note: In counting the persons employed by a business, a casual employee is not to be counted unless he or she is employed by the business on a regular and systemic basis.	<input type="checkbox"/>	Yes
3	Is the contract value: (a) if the contract term is less than 12 months – less than, or equal to, \$300,000; or (b) if the contract term is 12 months or more – less than, or equal to, \$1 million? Note: In working out the upfront price payable under which credit is, or is to be, provided – disregard any interest payable under the contract.	<input type="checkbox"/>	Yes

Excluded terms

4	If a term falls within any of the following categories, then that term will be exempt from the unfair contract terms laws: (a) A term that defines the main subject matter of a contract. Note 1: The main subject matter of a contract refers to the goods or services (including land, financial services or financial products) that the small business customer is acquiring under the contract. It may also include a term that is necessary in order for the product or service to be supplied. Note 2: Where a small business customer has decided to purchase particular goods or services, they cannot then challenge the fairness of a term that defines these goods or services, given that they had a choice of whether or not to make the purchase on the basis of what	<input type="checkbox"/>	Yes The term will be exempt from the unfair contract terms laws.
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Question

Answer

was offered. For example, a small business customer cannot allege that a term is unfair on the basis that they have changed their mind about, or no longer require, the good or service that they have agreed to purchase.

(b) A term that sets out the 'upfront price' payable under the contract.

Note 1: The upfront price in a small business contract is the amount that the small business customer agrees to pay under the contract, or to be paid, for the supply, sale or grant under the contract. This includes the cash price of, or a series of payments for, a good or service or sale or grant of an interest in land, or an interest for credit.

Note 2: The definition of upfront price also covers a future payment or a series of future payments provided these were disclosed at the time the contract is entered into. In considering whether a future payment, or a series of future payments, forms part of the upfront price, a court may take into account whether these payments were disclosed to the small business customer in a transparent way. A court may also consider whether the small business customer was made aware of the basis on which such payments would be determined, at or before the time the contract was made.

Note 3: The upfront price would not include terms that impose fees and charges levied as a consequence of something happening or not happening at some point over the period of the contract. These fees and charges are not payments necessary for the provision of the supply, sale or grant under the contract, but are additional costs to the upfront price. For example, terms that impose additional fees for a default or exit would be excluded from the upfront price.

Yes

The term will be exempt from the unfair contract terms laws.

(c) A term that is required or permitted by law.

Note: Statutory cooling off rights included in contracts is an example of a term permitted as a matter of public policy.

Yes

The term will be exempt from the unfair contract terms laws.

(d) A term that has been negotiated between the parties (that is, it has not been presented on a 'take it or leave it' basis).

Note: If a term has been subject to negotiation between the parties and has not been presented on a 'take it or leave it' basis, it is less likely that it will be considered to be an unfair term. This is because a party would need to claim that a term that it had input into and was able to negotiate was unfair. It may also be the case that a contract with negotiated terms would not be found to be a standard form contract.

Yes

The term may be exempt from the unfair contract terms laws.

Excluded contracts

5 If the contract falls within any of the following categories, then such contract will be exempt from the unfair contract terms laws.

(a) A shipping contract, being either:

Yes



Question	Answer
<ul style="list-style-type: none">• a contract of marine salvage or towage;• a charter party of a ship; or• a contract for the carriage of goods by ship. <p>Note: Shipping contracts are excluded as they are subject to a comprehensive legal framework (nationally and internationally) that deals with maritime contracts.</p>	The contract will be excluded from the unfair contract terms laws.
<p>(b) A constitution of a company, managed investment scheme or other kind of bodies.</p> <p>Note: A constitution is defined in the <i>Corporations Act 2001</i> (Cth).</p>	<input type="checkbox"/> Yes The constitution will be excluded from the unfair contract terms laws.
<p>(c) An insurance contract that is governed by the <i>Insurance Contracts Act 1984</i> (Cth).</p> <p>Note: Reinsurance contracts, private health insurance contracts, and State and Northern Territory government insurance contracts (as well as certain other types of insurance contracts) are not regulated by the Insurance Contracts Act and are therefore subject to the unfair contract terms laws.</p>	<input type="checkbox"/> Yes The contract will be excluded from the unfair contract terms laws.
Terms that cause significant imbalance	
<p>6 On the balance of probabilities, does the term cause a significant imbalance in the parties' rights and obligations arising under the contract?</p> <p>Note: This involves a factual assessment of the available evidence. The claimant has to prove that, on the balance of probabilities, a term of a small business contract would cause a significant imbalance in the parties' rights and obligations arising under the contract.</p>	<input type="checkbox"/> Yes Go to question 7.
<p>7 If you answered yes to question 6:</p>	
<p>(a) Does the term lack transparency?</p> <p>Note: A term is considered to be transparent if it is:</p> <ul style="list-style-type: none">• expressed in reasonably plain language;• legible;• presented clearly;• readily available to any party affected by the term.	<input type="checkbox"/> Yes The term may be unfair.
<p>(b) Would the term be unfair having regard to the contract as a whole?</p> <p>Note 1: The fairness of a particular contractual term must be assessed in light of the contract as a whole. This will involve an assessment of the need to balance the legitimate commercial interests of the business against the detriment the term would cause to a small business customer if it were enforced.</p> <p>Note 2: A term which, on the face of it, appears to be unfair could be</p>	<input type="checkbox"/> Yes The term may be unfair.



Question

Answer

regarded in a better light when seen in the context of other counterbalancing terms.
For example, a potentially unfair term may be included in a small business customer contract but may be counterbalanced by additional benefits (such as a lower price) being offered to the small business customer.

Terms that are not reasonable to protect legitimate interests

8 On the balance of probabilities, is it the case that the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term?
Note: The party advantaged by the term needs to prove that its interest is legitimate. Such interest must be sufficiently compelling to overcome any detriment caused to the small business customer and therefore 'reasonably necessary'.

Yes
Go to question 9.

9 If you answered yes to question 8:

(a) Does the term lack transparency?
Note: A term is considered to be transparent if it is:

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

Yes
The term may be unfair.

(b) Would the term be unfair having regard to the contract as a whole?
Note 1: The fairness of a particular contractual term must be assessed in light of the contract as a whole. This will involve an assessment of the need to balance the legitimate commercial interests of the business against the detriment the term would cause to a small business customer if it were enforced.
Note 2: A term which, on the face of it, appears to be unfair could be regarded in a better light when seen in the context of other counterbalancing terms.
For example, a potentially unfair term may be included in a small business customer contract but may be counterbalanced by additional benefits (such as a lower price) being offered to the small business customer.

Yes
The term may be unfair.

Terms that cause significant imbalance

10 On the balance of probabilities, would any term cause detriment (whether financial or otherwise) to the small business customer if it were to be applied or relied on?
Note: Detriment may include financial detriment, or delay or distress for the small business customer. A small business customer need not show proof of actual detriment, but must show more than a

Yes
Go to question 11.



Question		Answer
	hypothetical case in which it would suffer detriment.	
11	If you answered yes to question 10:	
	<p>(a) Does the term lack transparency? Note: A term is considered to be transparent if it is:</p> <ul style="list-style-type: none">expressed in reasonably plain language;legible;presented clearly;readily available to any party affected by the term.	<p><input type="checkbox"/> Yes The term may be unfair.</p>
	<p>(b) Would the term be unfair having regard to the contract as a whole? Note 1: The fairness of a particular contractual term must be assessed in light of the contract as a whole. This will involve an assessment of the need to balance the legitimate commercial interests of the business against the detriment the term would cause to a small business customer if it were enforced. Note 2: A term which, on the face of it, appears to be unfair could be regarded in a better light when seen in the context of other counterbalancing terms. For example, a potentially unfair term may be included in a small business customer contract but may be counterbalanced by additional benefits (such as a lower price) being offered to the small business customer.</p>	<p><input type="checkbox"/> Yes The term may be unfair.</p>
Unilateral right to avoid or limiting performance		
12	<p>Does any term effectively permit one party (but not another party) to avoid or limit the performance of the contract? Note 1: If a term is qualified in such a way that the small business customer can understand when and how they are likely to be effected, then that term is less likely to be considered unfair. Note 2: There are instances where limitations of liability are expressly permitted by Commonwealth, state or territory legislation for public policy reasons.</p>	<p><input type="checkbox"/> Yes The term may be unfair.</p>
Unilateral termination rights		
13	<p>Does any term effectively allow one party (but not another party) to terminate the contract? Note 1: Terms that allow a party to cancel a contract at will, without it being reasonably necessary to protect the party's legitimate interests, may be unfair. Note 2: A term which undermines a small business customer's right to terminate the contract may also be considered unfair.</p>	<p><input type="checkbox"/> Yes The term may be unfair.</p>



Question	Answer
Penalising a party for termination or breach	
<p>14 Does any term effectively penalise one party (but not another party) for a breach or termination of the contract?</p> <p>Note 1: Terms that impose penalties for trivial breaches of a contract by small business customers may be unfair. A term may also be considered unfair if it threatens sanctions over and above those that can be imposed by law.</p> <p>Note 2: A penalty imposed by a contract should bear a reasonable relationship to the loss likely to be suffered by the business as a result of the breach or early termination, and should not be an arbitrary sum.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Unilateral variation	
<p>15 Does any term effectively allow one party (but not another party) to vary the terms of the contract?</p> <p>Note 1: A contract term that allows the business to alter the terms of the contract after it has been agreed may be unfair.</p> <p>Note 2: A unilateral variation clause may not be unfair if the right to vary the contract is for legitimate reasons, which are specified in the contract. Any unilateral variation clause should be clearly expressed.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Unilateral renewal rights	
<p>16 Does any term effectively allow one party (but not another party) to renew or not renew the contract?</p> <p>Note: In some cases, automatic renewal of a contract may be reasonably necessary and may not cause a significant imbalance between the parties. Automatic renewal for a reasonably short period is common practice in some industries and can benefit the small business customer.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Unilateral variation of upfront price	
<p>17 Does any term effectively allow one party to vary the upfront price payable under the contract without the right of another party to terminate the contract?</p> <p>Note 1: A term which allows a party to unilaterally increase the price has significant potential for unfairness. If there is a legitimate interest for including such term, it would need to be transparent and clearly disclosed to the customer.</p> <p>Note 2: Such clause is less likely to be considered unfair if the small business customer is able to terminate the contract if they do not agree to the change. Although, this is not always the case – as it may be unfair even if there is a right to cancel the contract (for example, a clause may be unfair if it permits a party to charge a customer a different price on delivery than from the price quoted at the time of entering into the contract).</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>



Question	Answer
Unilateral variation to the characteristics of goods or services to be supplied	
<p>18 Does any term effectively allow one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, or the financial goods or services to be supplied under the contract?</p> <p>Note 1: The clause may not be considered unfair if the ability to vary the characteristics is limited in scope and the small business customer understands, and agrees to, the changes in advance. This could be coupled with giving the customer the right to terminate the contract without penalty if the business cannot supply the product or service agreed to in the contract.</p> <p>Note 2: The clause may not be unfair if notice of such variation is given and the small business customer is offered the option of terminating the contract for a period after the notice is given.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Unilateral right to interpret contract	
<p>19 Does any term effectively allow one party unilaterally to determine whether the contract has been breached or to interpret its meaning?</p> <p>Note: A term of a small business contract may be unfair where it allows a business to reserve the right to decide the meaning or interpretation of a contractual term.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Limitation of liability for agents	
<p>20 Does any term effectively limit one party's vicarious liability for its agents, unless permitted by law?</p> <p>Note: Where limited liability terms are required or expressly permitted by a law of the Commonwealth or a state or territory, such terms will not come within the ambit of the unfair contract terms provisions.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Unilateral assignment rights	
<p>21 Does any term effectively allow, or have the effect of allowing, one party to assign the contract to the detriment of another party without that other party's consent, unless permitted by law?</p> <p>Note 1: A unilateral assignment right may not be considered unfair if it operates in circumstances where a small business customer's rights will not be detrimentally affected by the assignment.</p> <p>Note 2: Where assignment clauses are required or expressly permitted by a law of the Commonwealth or a state or territory, such terms will not come within the ambit of the unfair contract terms provisions.</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be unfair.</p>
Limiting right to sue	
<p>22 Does any term effectively limit one party's right to sue another party?</p> <p>Note: Terms that require a small business customer to bring legal</p>	<p><input type="checkbox"/> Yes</p> <p>The term may be</p>



Question	Answer
proceedings in a foreign court may also be unfair.	unfair.
Limiting evidence a party can adduce	
23 Does any term effectively limit the evidence one party can adduce in proceedings relating to the contract?	<input type="checkbox"/> Yes The term may be unfair.
Limiting right to provide evidence	
24 Does any term effectively limit the evidence one party can present if taking legal action? Note: A term that limits presentable evidence to the contract itself and excludes pre-contractual negotiations may be considered unfair. This is because such clause may deter a small business customer from taking action.	<input type="checkbox"/> Yes The term may be unfair.
Imposing burden of proof	
25 Does the term effectively impose the burden of proof on one party? Note: A term that requires a small business customer to prove unreasonable or potentially unprovable elements of a dispute, may be unfair.	<input type="checkbox"/> Yes The term may be unfair.

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