



# Changes to contract laws will make unfair contract terms illegal from November 2023

**Date: Monday March 6, 2023**

New laws were passed in late 2020 by Federal Parliament which amend the Competition and Consumer Act 2010 (Cth), including the Australian Consumer Laws and the Australian Securities and Investments Commission Act 2001 (Cth), aiming to protect consumers (individuals) and small businesses from unfair contracts. Under the new and amended laws, from November 2023, all unfair contract terms will be illegal and parties using unfair contract terms may face severe penalties.

## What are unfair contract terms?

A term within a contract is considered unfair where:

the contract term or clause would create an imbalance between what rights or responsibilities the contract gives to each party (e.g where the obligations and benefits are not shared fairly between the parties);

the clause is not required to protect one party's interests (the party who receives the benefit or advantage from the unfair contract term); and

the term will cause loss (not just financially) to the party who does not receive the benefit of the clause.

When deciding whether a contract term is unfair, the court will look at that term, as well as the entirety of the contract that the term is in. This is because if it is read by itself, some terms may seem unfair, but if they are considered with the other terms that make up the contract, it may be fairer or more balanced.

# Who is protected by unfair contract terms?

Australian Laws relating to unfair contract terms are in place to protect certain people and entities from the power and negotiating imbalance they may experience when entering into contracts and agreements.

Unfair contract term laws operate on contracts where at least one of the parties is a consumer and/or small business, and unfair contract term laws aim to protect these parties.

The applicable contract to which unfair consumer laws apply for small businesses and consumers are contracts which:

- are made at the time the laws were in place and applicable; and

- are standard form contracts which include where the contract is prepared by the other party and provided to the small business for them to sign and there is no opportunity for the small business to negotiate the terms of the contract.

Currently (and until the changes come into effect in November 2023), for small business, there are additional requirements to be met in order to fall under the unfair consumer law rules, including contracts:

- regarding the supply of goods or services (e.g buying products or engaging the services of another person or entity) or the sale or grant of an interest in land (e.g purchasing property or entering into a lease);

- that have an upfront payable price under the applicable threshold; and

- which were entered into after 12 November 2016 (or if the contract was entered into before that date but has been changed after that date, then the unfair contract laws will apply).

## What are the changes to unfair contract terms from November 2023?

### Definition of small business

With the new laws, the definition of small business will increase to include businesses which have less than 100 employees or have an annual turnover of less than \$10 million. This means that from November 2023, there will be far more businesses which are protected by these laws.

## Definition of small business contract

Another change which will likely see more contracts fall within the unfair contract term laws is that the maximum upfront price payable threshold will be removed. This is true for all contracts except for contracts governed by the Australian Securities and Investments Commission Act 2001 (Cth) (e.g financial services contracts) for which the maximum upfront price payable will increase to \$5,000,000.00.

## New penalties for breaches of unfair contract term laws

Previously (and until November 2023), if a term was considered to be an unfair contract term, the consequence would be that that particular term would be considered 'void'. This would not affect other terms, obligations and benefits in the rest of that contract. When a term is void, the contract then operates as if that unfair term was never included.

From November 2023, though, unfair contract terms will be considered illegal which could mean a variety of penalties could be imposed. While this still includes declaring that the unfair contract term could be void and unenforceable, it could also include the use of injunctions to prevent the use of, or reliance on, that term in the future, various orders being made and financial civil penalties which may be imposed for the use of unfair contract terms.

The maximum civil penalties are:

for individuals, \$2.5 million; or

for companies (and other bodies corporate), the maximum penalty will be the larger of:

\$50 million;

3 x the benefit value obtained by using the unfair contract term; or

where the benefit value cannot be calculated, 30% of the company's adjusted turnover during the period of the breach.

# What does this mean for a business and other people entering contracts?

For businesses and individuals, this means that they have until November 2023 to review their contracts to ensure they do not include any unfair contract terms. They should review their contracts to identify any terms which might be considered 'standard form contracts' and should ensure these documents are amended to remove or amend any terms or clauses which may be considered unfair.

## Get help with your business contracts from an experienced commercial lawyer

IM Lawyers are [experienced commercial lawyers](#) with the expertise required to review these contracts and recommend amendments which will ensure that the terms are not considered 'unfair' but will still ensure you are protected by that contract.

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