

Are you ready for the Unfair Contracts Act?

What to expect under the new Act

On 12 November 2016, the *Unfair Contracts Act* will commence operation. Although it is my personal view that this Act will not add much to the regime contained in the Australian Consumer Law in relation to unconscionable conduct and contracts, it is also my view that the presence of legislation specifically dedicated to unfair contract terms will likely lead to an increase in litigation centred upon the unfairness of terms in contracts.

The *Unfair Contracts Act* will apply to standard form contracts and small businesses.

A standard form contract is basically a contract that was prepared prior to the agreement with the customer and has been provided to the customer with no negotiation and no intent to negotiate the terms – in other words, most contracts for the supply of specialised goods and services, Australia-wide.

A small business is one which employs less than 20 people at the time that the contract is signed (or completed, this is up for debate).

Examples of typical contract clauses that may offend the Unfair Contracts Act are:

- Indemnity costs clauses – these clauses allow suppliers to recover their legal costs in respect of any dispute on a full indemnity basis. There is usually no reciprocal right of recovery by the customer.
- Arbitrary termination clauses – these clauses allow suppliers the right to terminate an arrangement without default or consultation with the customer, but do not allow the customer the same right.
- Automatic Rollover clauses – these clauses state that, unless the customer expressly terminates a contract at the end of its term, the contract will rollover for a further period and the customer will remain liable for ongoing supply costs for that period.
- Default Clauses – sometimes, these clauses require the customer to undertake a different, more onerous process on default by the supplier than that which the supplier is required to undertake.
- Clauses which seek to avoid the operation of certain legislation (for example, the Australian Consumer Law), when the relevant provisions cannot be contracted out of.
- Clauses which create a substantial imposition on the customer (for example, a charge) but have been included in an unrelated section of the agreement.
- Clauses which are not easily interpreted or are drafted in language which is confusing.
- Contracts where the general terms are not included with the signed document and the customer is forced to source the general terms on the supplier's website.

With the date of the commencement of the Act drawing closer, it is important that, if you think your standard agreements contain anything that may be offensive to the Act, you review and revise those terms, as the

impact on your business may be significant where the offending clauses will be susceptible to being struck from your agreements.

By way of example, if a court finds that the indemnity costs clause is unfair because it affords you the right to the costs of any breach on an indemnity basis but not your customer, the clause would be struck from the agreement and you would be limited to recovering costs under the court scale.



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