



Australian
Competition &
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NEWS RELEASE

BUSINESSES REMOVE UNFAIR CONTRACT TERMS BEFORE NEW LAW

The Australian Competition and Consumer Commission's new report into potentially unfair contract terms details its review of 46 contracts across seven industries, which resulted in a range of businesses making changes to their small business standard form contracts.

The ACCC will begin enforcing the new law this week [Nov 12], when consumer protections against unfair contract terms are extended to include up to 2 million Australian small businesses.

The report, *Unfair terms in small business contracts*, provides an industry-by-industry breakdown of the common terms of concern identified by the ACCC following its engagement with businesses in seven industries, including advertising, telecommunications, retail leasing, independent contracting, franchising, waste management, and agriculture.

"Businesses should be aware that from Saturday the ACCC is moving from its education phase to an enforcement approach where we will be targeting unfair contract terms," ACCC Deputy Chair Dr Michael Schaper said.

"Positive engagement with the ACCC over the last year has seen businesses such as Australia Post, News Limited, Optus and Scentre Group (Westfield) amend or remove contract terms that may have been problematic when the new law commences."

"Small businesses sign an average of eight standard form contracts a year and from November 12 these contracts will be covered by a law preventing unfair terms in contracts that are offered on a 'take-it or leave-it' basis."

The ACCC has identified three types of problematic terms as being widespread and likely to cause concern.

"Terms that give one party an unconstrained right to unilaterally vary key aspects of a contract, that unfairly seek to shift liability from the contract provider to the small business or that provide unnecessarily broad termination rights will almost always raise concerns about unfairness. Businesses that rely on these types of terms should be aware that they are leaving themselves open to action by the ACCC or another party," Dr Schaper said.

"Businesses should consider whether a contract term creates an imbalance of obligations between the parties, whether it is necessary to protect a legitimate business need, and whether it causes detriment to the other party. Businesses should ensure that potentially problematic terms are only as broad as reasonably necessary to protect their legitimate interests, as terms that grant rights beyond this are likely to be unfair."

The report provides guidance to these industries about these specific concerns, but also serves as general guidance to businesses operating in other industries about the kinds of terms that may be considered unfair from November 12.

Previous research has shown almost two thirds of small businesses claim to have experienced unfairness in contract terms and conditions they have signed, with almost half report experiencing some harm as a result.

Background

The law will apply to a standard form contract entered into or renewed on or after 12 November 2016. If a contract is varied on or after 12 November 2016, the law will apply to the varied terms.

Contracts covered include those between businesses where one of the businesses employs less than 20 people and the contract is worth up to \$300,000 in a single year or \$1 million if the contract runs for more than a year.

Standard form contracts provide little or no opportunity for the responding party to negotiate the terms – they are offered on a ‘take it or leave it’ basis.

The law sets out examples of contract terms that may be unfair, including:

- terms that enable one party (but not another) to avoid or limit their obligations under the contract
- terms that enable one party (but not another) to terminate the contract
- terms that penalise one party (but not another) for breaching or terminating the contract
- terms that enable one party (but not another) to vary the terms of the contract.

Only a court or tribunal (not the ACCC) can decide that a term is unfair. However, if a court or tribunal finds that a term is ‘unfair’, the term will be void – this means it is not binding on the parties. The rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term.

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