

New unfair contract terms laws

Important advice for procurement professionals

On and from 12 November 2016, changes to the *Competition and Consumer Act 2010* protect certain small businesses from unfair contract terms. This is an extension of the application of the unfair contract terms laws which have, since 2011, applied to consumer contracts.

If a court finds that a term is unfair, the term will not be binding on the parties.

Officers of government entities should be mindful of the application of the unfair contract terms laws when entering into, renewing or varying contracts with small businesses on and from 12 November 2016.

The following is a general guide to the application of these laws as they may apply to government contracts with small businesses.

What contracts are covered?

The unfair contract terms laws will apply to government contracts with small businesses where *all* of the following apply:

1. *The government entity is 'carrying on a business'*

Procurement activities relating to the execution of a statutory duty or government function will generally not be 'carrying on a business'. Where a government entity's activities contain an element of trade or commerce, such as a private citizen or trade might undertake, this may lead to a conclusion that the government entity is 'carrying on a business'. It is also relevant if the government entity competes with private-sector suppliers of the same or substitutable goods or services.

Commercialised government entities, such as commercialised business units, are likely to be regarded as 'carrying on a business' in many circumstances. However, all government entities – even those without a commercial focus – need to carefully consider their own circumstances to identify if and when they are carrying on a business.

Providing detailed advice on the circumstances in which a government entity may be 'carrying on a business' is outside the scope of this document.

2. *The government entity uses a 'Standard Form Contract' entered into, varied or renewed on or after 12 November 2016 (if an existing contract is varied on or after 12 November 2016 the law applies to the varied terms)*

Factors which may indicate that a contract is a 'standard form contract' include where:

- one party had all or most of the bargaining power;
- the contract was prepared by one party before discussions occurred between the parties;



- a party was required either to accept or reject the terms of the contract in the form in which they were presented;
- a party was not given an effective opportunity to negotiate the terms of the contract;
- the contract terms do not take into account the specific characteristics of another party or the particular transaction.

A contract is presumed to be a 'standard form contract' unless proved otherwise.

3. *The contract is a 'Small Business Contract'*

A contract is a 'Small Business Contract' if *all* of the following apply:

- it is for a supply of **goods or services** or a sale or grant of an **interest in land**; and
- a party to the contract (for example, a supplier) **employs less than 20 people** at the time the contract is entered into, and
- the **upfront price payable** under the contract is no more than \$300 000, or, if the contract has a duration of more than 12 months, no more than \$1 million.

Terms that may be unfair

A term will be unfair (and at risk of being declared void) if *all* three following conditions are met:

- the term would cause a significant imbalance in the parties' rights and obligations under the contract; and
- the term is not reasonably necessary in order to protect the legitimate interests of the government; and
- the term would cause a detriment (whether financial or otherwise) to the small business supplier if it were to be applied or relied on.

In determining whether a term is unfair, the following must be taken into account:

- the contract as a whole; and
- the extent to which the term is 'transparent'. A term is 'transparent' if it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.

Examples of terms which a court may decide are unfair include terms that:

- allow one party (but not the other) to avoid or limit their obligations under the contract;
- allow one party (but not the other) to vary, renew, assign or terminate the contract; or
- penalise one party (but not the other) for breaching or terminating the contract.

This does not mean that these terms will be unfair in all circumstances. There may be circumstances in which these types of terms may be reasonably necessary in order to protect the legitimate interests of the government entity.

There are certain terms to which unfair contract terms laws do not apply. These are terms which define the main subject matter of the contract, terms which set the upfront price payable or terms required or expressly permitted by an Australian law. There are also certain types of contracts to which the unfair contract terms laws do not apply, such as certain marine contracts, certain constitutions or small business contracts to which a prescribed law applies.

How to minimise risk

Where a government entity wishes to minimise the risk of a contract term being found to be unfair, consideration may be given to the following:

<ul style="list-style-type: none"> • Giving offerors an opportunity to request amendments to the terms. • Giving genuine consideration to requested amendments, having regard to the specific characteristics of the other party and the particular transaction. • Documenting any negotiations about the terms. 	<p>These steps may reduce the likelihood that a contract is regarded as a 'Standard Form Contract'.</p>
<ul style="list-style-type: none"> • Where an amendment requested by an offeror is not accepted by the government entity, communicating and/or documenting the reason(s) and justification(s) for the rejection. 	<p>This may assist in establishing that a term was reasonably necessary to protect the legitimate interests of government and support a defence against a claim that a term was unfair.</p>
<ul style="list-style-type: none"> • Ensuring the contract terms are clear. 	<p>This may assist in establishing that the term was transparent and support a defence against a claim that a term was unfair.</p>

Further information and advice

Further information in relation to the new requirements is available on the [Australian Competition and Consumer Commission's website](#).

Please note, the above is intended as general information only. If you have specific queries in relation to the new requirements it is strongly recommended that you seek legal advice specific to your circumstances.