



HOW TO PROTECT YOUR
BUSINESS
FROM THE NEW **UNFAIR**
CONTRACTS LAWS



CLEAR**SCOPE** LEGAL



Why do the new laws matter?

On 12 November 2016, new and far-reaching laws on standard contracts came into effect. These laws cover all “standard form” contracts with small businesses with less than 20 employees – and there are serious consequences if your business does not comply:

- The Australian Consumer and Competition Commission will be carrying out random checks, which could result in expensive court action.
- Even if the ACCC does not take action, part or all of your existing standard contracts could be void.

Do the new laws apply to me?

The new laws will apply if the following 5 key criteria are met:

1. At the time the contract starts, does one of the parties to the contract have less than 20 employees?

- **Important:** Even casual employees will count, as long as they are employed on a “regular and systematic basis”

2. Is the contract for the supply of goods or services, for the sale of land, or for the grant of an interest in land?

Some common examples:

- Trading terms and conditions
- Supply agreements
- Licensing agreements
- Off-the-plan sales
- Retail or commercial leases

3. Is the contract a “standard form” contract?

To answer this question, ask yourself:

- Did only one party prepare the contract?
- Does the contract take into account the specific characteristics of a party, or is it a “one-size-fits-all”?
- Is the contract presented on a take-it-or-leave-it basis with no opportunity to negotiate the terms?
- Does one party have all the bargaining power?



4. Is the upfront contract price less than \$300,000 – or if the contract has a term of more than 12 months, is the upfront contract price less than \$1,000,000?
 - In determining the upfront contract price, disregard any interest payable.
5. Did the contract start after 12 November 2016, or was it renewed or varied after this date?
 - **Take note:** even minor variations of the contract after 12 November 2016 will count, as will old contracts that automatically renew after 12 November 2016.

**** If you answered “YES” to the above 5 questions, the new laws will apply to you so please read on carefully ****

Are there any “unfair” terms in the contract?

To answer this question, ask yourself the following:

- Is there any term in your standard contract that causes a significant imbalance between the parties' rights and obligations?
- If there is any such term, and you relied on that term, would it cause detriment to the other party?

If the answer to the above questions is “YES”, the term may well be unfair.

- Unless you can show that the term is there to protect your legitimate business interests.

So if there are unfair terms in my contract, what happens?

- Those terms will be void and will be removed from the contract.
- If the contract can continue without the unfair terms, the contract will continue.
- But if the contract cannot continue without the unfair terms, **the whole contract will be cancelled!**



Finally, note the following important exclusions from the new laws:

- Terms that define the main subject matter of the contract are not covered. For example:
 - In a services agreement – the term that defines which services are being provided.
 - In a licence agreement – the term that defines which rights are being licensed.
- Also excluded are terms that define the upfront price payable under the contract.
- Insurance contracts, company constitutions and certain maritime contracts are completely excluded.

4 very common problems posed by the new laws – and some very practical suggestions*

Limitations of Liability

One of the most common type of clauses at risk of being unfair under the new laws is a “limitation of liability”. This type of clause limits one party’s liability – usually when there is a breach of contract.

- **Common example:** Terms and conditions for supply of goods or services. A limitation of liability clause will often limit the supplier’s liability to the value of goods or services supplied in a specified period (eg to the value of goods or services supplied in the 12 months before the liability in question arises).
- **Suggestions:**
 - Make the limit of liability 2 ways, not just for the benefit of one party.
 - Increase the period of time of supply – eg the value of goods in the past 24 months.

*These general suggestions do not take your circumstances into account. You should obtain legal advice about your circumstances before implementing any of these suggestions.



Right to change the terms and conditions

Standard Terms and Conditions often include a term like this:

The Supplier reserves the right to change these Terms and Conditions on 30 days' notice to the Customer, or by publishing the new Terms and Conditions on the Supplier's website at least 30 days before the changes take effect.

Such a term is at risk of being unfair and therefore void. Think about whether you can overcome this by:

- Giving the Customer a right to opt for the previous terms and conditions to continue – and if the Customer does not opt within a given timeframe, the new Terms and Conditions will apply.

Obligations owed “up the line” to suppliers which you may no longer be able to pass on to customers

You may have supply agreements in place that place onerous obligations on your company. In the past you would simply ensure that you “back-to-back” your customer agreements with your supplier agreements. For example, a supplier might limit warranties on goods and you might similarly limit your warranties to your customers. The new laws may prevent you from doing this. If you believe you fall into this category, you might consider:

- Renegotiating supply agreements to bring them in line with your customer agreements.
- Or if you cannot renegotiate supply agreements, you may need to accept that the new laws mean that risk is being re-allocated to your business, and you may need to adjust some of your commercial terms with your customers to allow for this.

Having two versions of your standard contracts

The new laws mean that you need to be more careful with standard contracts between your business and other businesses with less than 20 employees. But what if you also deal with large businesses with more than 20 employees?

- Here, your standard contracts will not be affected by the new laws.
- Consider whether to create another version of a standard form contract to use with business of 20+ employees.



- **But take note:** You will need to carefully consider how to check the number of employees. Because if you do your due diligence, determine that a business has more than 20 employees and it turns out there are actually less, the new laws will still apply to your contract.

 **FREE OFFER** 

Do you have more questions about the new unfair contracts laws? Take advantage of this offer **FOR A LIMITED TIME**.

We will carry out **A FREE PRELIMINARY REVIEW** of your contract and follow up with a **FREE 20 MINUTE PHONE CONSULTATION**. Simply send your standard contract to us at admin@clearscopelegal.com.au or call us on 03 8683 5645.