

## Fair Trading Amendment Act

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The Fair Trading Act 1986 (**Act**) has, since March 2015, prohibited the use of unfair contract terms in standard form consumer contracts, i.e. business to consumer contracts. The Fair Trading Amendment Act 2021 (**Amendment Act**) came into force on 16 August 2022 and implements three new protections to address unfair practices, including a prohibition on unconscionable conduct, extending unfair contract terms to cover standard form small trade contracts and the right to require uninvited sellers to leave or not enter your property. This article focuses on the extension of unfair contract terms to standard form small trade contracts, i.e. business to business contracts.

### **A. Small trade contract**

A contract will be a “small trade contract” if:

- each party is engaged in **trade**
- it is **not a consumer contract**
- it does not form part of a **trading relationship that exceeds \$250,000** (including GST, if applicable) when the first (or only contract) of the trading relationship is entered into.

A “trading relationship” consists of the contemplated contract and any other contract between the parties on the same or substantially similar terms. A trading relationship exceeds the annual value threshold (and is not a small trade contract) if the contract contemplates consideration of \$250,000 (including GST, if applicable) or more to be paid in any 12-month period.

### **B. Standard form**

This regime will only apply to small trade contracts that are “**standard form contracts**”, being contracts that have not been subject to effective negotiation between the parties. In making that determination a Court must consider:

- whether one party has all or most of the bargaining power
- whether the contract was prepared by one party before any discussion occurred
- whether one party was required to accept or reject the contract terms in the form presented. In other words, was the contract offered on a “take it or leave it” basis

- the extent to which the parties had an effective opportunity to negotiate the terms
- the extent to which the terms of the contract consider the specific characteristics of any party to the contract

If one party alleges that a contract is a standard form contract, it is presumed to be so unless the other party proves otherwise.

### C. What are “unfair terms”?

There are three fundamental elements that could lead to a Court deciding that a term is unfair:

- If there is significant imbalance in the rights and obligations of the parties
- If the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- If the term would cause detriment (financial or otherwise) to a party if it were applied, enforced, or relied on.

The Amendment Act will not apply to contracts that have been entered into prior to 16 August 2022 unless the contract is varied or renewed on or after this date. In addition, the unfair contract terms provisions do not apply to insurance contracts.

#### When considering if terms are unfair, as a general guide consider:

- Are they transparent, in reasonably plain language, presented clearly and readily available to any party affected?
- Are they justifiable and reasonably necessary to protect the legitimate interests of the business seeking to enforce them?
- Are terms mutual in nature, particularly for indemnity, liability and termination provisions?

If there is concern that a contract term may be unfair, a complaint can be made to the Commerce Commission to determine if they will bring an application to the Court. If the Court declares a small trade contract term to be unfair, it will not be enforceable and will breach the Act.

Every person who contravenes the Act commits an offence and is liable on conviction to a fine not exceeding \$200,000.00 for an individual or a fine not exceeding \$600,000.00 for a body corporate.

It is important for businesses to understand the extension of the unfair contract terms regime to business to business contract relationships and it is recommended that suppliers undertake a review of all standard form contracts to check for compliance with the changes introduced by the Amendment Act.

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