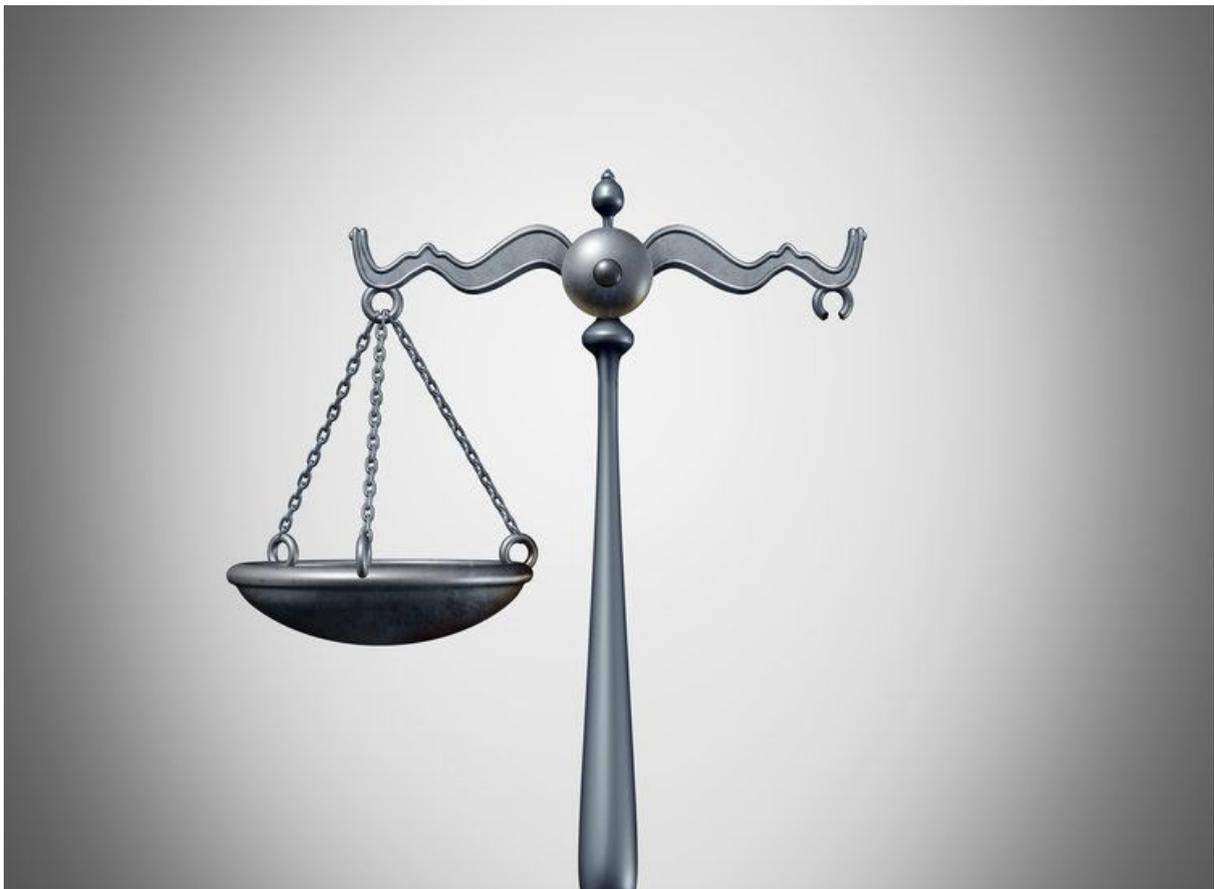


Whether you are a B2C or B2B business, you need to be aware of how unfair contract terms laws can affect the way your business operates.

THE LAW

The national unfair contract terms laws that came into effect on 1 July 2010 allow courts to declare unfair terms, when found in standard form contracts, void.

From 12 November 2016, the unfair contract terms laws extended to protect small businesses as well (with some exclusions). Small business owners, subject to certain pre-requisites, are now protected when they are on the receiving end of unfair standard contracts.



The 3 Element Test for Unfairness:

- It would cause a significant imbalance in the parties' rights and obligations under the contract;
- It is not reasonably necessary to protect the legitimate interest of a party to the contract (note that the party who would be advantaged by the term must prove that it is reasonably necessary); and

- It would cause detriment to a party to the contract if it were to be applied or relied upon.

In determining whether a term is unfair in accordance with the above, the whole contract needs to be considered as well as the term's transparency. Terms that are excluded are those that set the upfront price and subject matter of a contract and those that are permitted under another law.

B2C

SUPPLY TERMS AND CONDITIONS THAT HAVE BEEN THE SUBJECT OF REVIEW BY THE ACCC:

Terms which allow you to change the contract without consent from the consumer

Example: telecommunications companies (prior to ACCC's review and recommendations) had clauses requiring consumers to pay subscription fees applicable to the plan where fees and charges could be altered from time to time.

To comply: delete the right to vary fees or allow consumers to terminate the contract without penalty if they do not agree to the new fees.

Terms that absolve you from liability when you are actually acting as agent for a principal in a transaction

Example: If you are a booking agent (for hotels, airlines,) and have not disclosed your agency relationship with the providers of the services and have included in your contract that you are not liable in the event that services are not available.

To comply: It is advisable that your agency relationship be disclosed and that you accept liability for your failure to provide the agency services which results in the non supply of the travel services.

Terms that unfairly restrict the consumer's right to terminate the contract

Example: Fitness studio long term contracts can be challenged if consumers are not made fully aware of the duration of the contract or the practical effect of exit and termination clauses when they sign up.

To Comply: Sign up procedures must ensure that consumers understand the exact duration of their contract, the effect of the exit and termination clauses with the removal of unnecessary and onerous pre-requisites to termination.

Terms that suspend or terminate the services being provided to the consumer under the contract

Example: Telcos having the right to terminate for “excessive or unusual use” where such clauses were designed to prevent customers from on-selling and supporting spamming and illegal activities. The provision, however, when couched in broad terms without definition or explanation, were found to have provided a broader right to the Telcos which verged on being unfair.

To Comply: A definition of “excessive or unusual use” was inserted to limit the telco’s rights to instances the clause was intended to prevent in the first place.

Terms that make the consumer liable for things that would ordinarily be outside their control

Example: Clauses requiring consumer to pay for all charges regardless of whether they authorised that use or not. Businesses reviewed by ACCC included major car hire companies and telcos.

To Comply: Here it is a matter of creating a balance between the supplier’s and the consumer’s rights. Perhaps guidance should be given to consumers as to how to prevent unauthorised use and transparency as to the limited circumstances when the customers assume responsibility for unauthorised use.

Terms that prevent the consumer from relying on representations made by your business or your agents

Example: Supply contracts sometimes contain a provision which places the responsibility on the part of the consumer to make his/her own enquiries and that statements made by the business/its agents or representatives not included in the written contract do not form part of the deal.

To Comply: Either a very limited application be accorded such provisions or these provisions need to be deleted in its entirety.

Terms seeking to limit consumer guarantee rights

Example: Provision stating that all warranties not specifically included in the contract are excluded. This is in contravention of the ACL (Australian Consumer Law) and is not valid.

To Comply: Such provisions must be qualified to the extent that they do not contravene the ACL.

Terms that seek to remove the consumer’s rights to a credit card chargeback facility when buying services through an agent

Credit card chargeback rights cannot be removed.

B2B

As suppliers, businesses need to be aware that the same laws apply when they transact with:

- small businesses (with < 20 employees)
- where the upfront price payable is less than \$300,000.00 or \$1 million if the contract is more than 12 months and
- relates to the supply of goods and services or the sale or grant of an interest in land.

THE ACCC HAS IDENTIFIED SOME CLAUSES THAT MAY RAISE CONCERNS IN ITS IMPLEMENTATION OF THE UNFAIR CONTRACTS TERMS LAWS (THESE ARE NOT EXHAUSTIVE):

Limited Liabilities and broad indemnities

The guiding principle here is that a purchaser's indemnity should only cover losses and expenses caused by its breaches or default and that a supplier should accept responsibility for its obligations.

A balance of the rights and obligations of the supplier and purchaser needs to be struck when drafting these clauses.

Termination clauses

Rights of termination by the supplier are to be assessed in light of the possible adverse consequences to the purchaser and the seriousness of the breach that triggers the right.

Unilateral variation

While acknowledging that the cost of supply to businesses can change during a long term supply contract, it is unfair to allow suppliers to amend pricing without the consent of the purchaser or giving the purchaser the right to terminate the contract if new pricing is not agreed.

Early Termination Charge

These charges can be fair if they are your genuine estimate of losses if the customer terminates the contract prior to the expiration of the term.

Restraint of Trade

If you are a franchisor, then the restraint of trade in your franchise agreement needs to be reasonable in terms of the restraint area, duration and activities.

WHERE THE ACCC TOOK ACTION

In [ACCC v Chrisco Hampers Australia Ltd \[2015\] FCA 1204](#) the Federal Court found a term in their lay-by agreement authorising Chrisco to continue debiting customer's account after full payment has been made was an unfair term. Whilst there are no pecuniary penalties for breaches of s.23 of the ACL, the Court separately found that Chrisco made a false and misleading representation under s.29 of the ACL that customers could not cancel a lay-by agreement after making their final payment and imposed a penalty of \$200,000.00.

Exetel, in 2015, informed its broadband customers who were on a 12 month fixed term plan that they were required to either change their broadband plan or terminate their Exetel service without penalty. The term that Exetel relied on in making this announcement was a clause which allowed Exetel to unilaterally vary its agreement for any reason. The ACCC considered that clause an unfair contract term and liaised with Exetel which resulted in the removal of the said clause, a refund of any additional monthly subscription costs incurred for the residue of the fixed term for customers who changed over to a new plan and a refund of any activation charge previously paid by customers who elected to terminate their service.

NEXT STEP

Conduct a review of your standard supply contracts to ensure that you are compliant. If you are a small business and have contracts with suppliers falling within the scope of protection referred to above, be mindful of the protection afforded by the ACL when negotiating your terms with your suppliers.

Note: The information contained in this article and on www.laulegal.consulting website is general information only and does not constitute legal or compliance advice.

LET US HELP YOU REVIEW YOUR CONTRACTS

CONTACT US FOR A CONSULTATION TODAY.