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# DOES YOUR CONTRACT HAVE UNFAIR TERMS?

## INTRODUCTION

Unfair terms in certain small business subcontracts entered after 12 November 2016 will now be void due to recent amendments made to the Australian Consumer Law. This summary will assist your understanding on what type of contracts are covered and how the law will interpret and deal with unfair terms in small contracts.

## WHAT IS A SMALL BUSINESS?

Small businesses are defined as businesses which employ less than 20 people. Thus, small businesses can include small subcontractors in the construction industry. The rule will apply to subcontracts that:

- have a contract price of \$300,000 or less;
- have a term of 12 months or less;
- have a contract price of \$1,000,000 or less if the term of the contract is more than 12 months;
- are for the supply of financial goods or services;
- are for the sale or grant of an interest in land; or
- have at least one party which is a 'small business'.

## WHEN DOES THE RULE APPLY?

The rule will apply to Standard Form Contracts.

Since the term 'Standard Form Contracts' is not defined in the legislation, we should turn to general principles to determine whether a contract has Standard Form.

The Court will consider whether:

- one party had most or all of the bargaining power during the transaction;
- whether the Contract was prepared by one party;
- whether the other party had to accept or reject the contract was of a Standard Form;
- whether a party was given the opportunity to negotiate the terms of the Contract; and
- whether the terms of the Contract reflect the specific interests of a party to the transaction.

It should be noted that there is a presumption that construction contracts are generally of the Standard Form, even if the contract has been slightly varied.

## WHAT IS AN UNFAIR TERM?

An “unfair” term is a term which:

- causes significant imbalance to the parties’ rights and obligations;
- is not reasonably necessary to protect the advantaged party; or
- causes financial or other detriment to a party.

A Court will also assess whether the term is transparent which involves a consideration as to whether the term is:

- expressed in reasonably plain language;
- legible;
- clearly; and
- available to a certain party.

## RELEVANT CONSIDERATIONS

To determine whether a term is unfair, the Court will also consider whether the term permits one party to:

- avoids or limits their performance of the contract;
- terminate contract;
- vary the terms of the Contract;
- renew or not renew the Contract;
- vary the upfront price payable under the Contract, without giving the other party the right to terminate;
- penalise the other for breach or termination;
- limiting the other party’s rights to sue; and
- vary the nature of the services to be supplied to determine whether the contract has been breached or to interpret its meaning or to assign the Contract to the detriment of another without that other party’s consent.

## EXAMPLES IN THE CONSTRUCTION CONTEXT

Examples of unfair terms in a construction contract may include:

- extension of time and delay clauses with onerous and unnecessary preconditions or bars on claims for delay or disruptions caused by the Principal;
- termination for convenience clauses which allow one party to terminate a Contract for convenience;
- variation clauses forcing a contractor to execute variations to the Scope of Works if ordered by the Principal;
- where one party has more rights to terminate than the other party, leading to an imbalance of rights;
- time bar provisions where a party is given an unreasonably short timeframe to provide a Notice of Claim;
- clauses giving a Principal or Head Contractor absolute discretion against the other party in relation to whether that party has breached the contract;
- clauses conferring the power to assign/novate the Contract to the detriment of another party and without their consent; and
- liquidated damages in residential building contracts where the amount may be underestimated in the case of the home owner’s loss caused by delays.

## WHAT HAPPENS IF A CONTRACT HAS AN UNFAIR TERM?

If a court finds that a term in a standard form contract is unfair, the term will be declared void. In other words, it will be treated as if the term was never contained in the contract.

The rest of the contract will continue to bind parties if it is capable of operating without the unfair term.

## EXCEPTIONS

Exceptions to 'unfair term' rules will include:

- terms required under law;
- terms relating to the subject matter of the contract; or
- terms outlining the price payable.

## AVOIDING UNFAIR TERMS

To ensure that a term of your contract will not be deemed unenforceable, parties to a contract should:

- review Standard Form Contracts and remove or amend any terms which may be deemed unfair;
- enquire as to whether the other party is a small business;
- add severance clauses into their contracts, allowing unfair clauses to be severed from the contract and the remaining terms to be enforceable;
- develop alternative contracts for contracts with small businesses; and
- provide small businesses with the opportunity to negotiate the terms of the subcontract.

## TAKE AWAY POINT

Overall, all parties to a Contract should be given the opportunity to negotiate the terms of the contract so that terms are not drafted in a manner which benefit one party.

Head contractors should be aware that a subcontractor may not be bound to carry out all the terms of a subcontract if a term is deemed unfair and thus void. Thus, head contractors should take steps to ensure that all the provisions of their subcontracts are enforceable.

### For more information

For more information on this case or for general advice on security of payment issues, contact our Principal Solicitor/ Director

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