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# ***ACCC Report highlights common terms in contracts with small business as potentially unfair***

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## ***In brief***

The new law against unfair terms in contracts with small businesses became operational on 12 November 2016.

The Australian Competition and Consumer Commission's (ACCC) recent report, [\*Unfair terms in small business contracts\*](#), (ACCC Report) has identified a range of contractual terms used across seven industries that the ACCC considered would be likely to cause concern under the new law. These included terms that allow the contract provider:

- to unilaterally vary terms that have a significant bearing on the contractual arrangement, or which could cause detriment if varied, in an unconstrained manner
- potentially broad and unreasonable powers to protect themselves against loss or damage at the expense of the small business by imposing broad indemnities or excessive limits on their liabilities
- an unreasonable ability to cancel or end an agreement as it suits them.

Other types of terms the ACCC identified as potentially unfair may come as more of a surprise to some businesses, such as "entire agreement clauses" which provide that the contract supersedes all written agreements, undertakings and communications, as well as automatic renewal clauses in particular circumstances.

With the new law having been identified by the ACCC as an enforcement priority, we encourage any business which has standard form contracts with a small business to urgently review their contracts, to the extent that they have not already done so, for compliance with the new law. Ultimately, it will be for a court or tribunal (not the ACCC) to determine if a term is unfair, and consequently void.

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## ***In detail***

### ***Recap on extension of unfair contract terms regime to small business***

The unfair contract terms provisions of the ACL now apply to a standard form contract with a small business entered into or renewed on or after 12 November 2016. If a contract is varied on or after 12

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November 2016, the law will apply to the varied terms.

A summary of the new law can be found in our earlier LegalTalk Alert [\*Government enacts unfair contract terms legislation to protect small business\*](#) dated 23 October 2015.

To recap, contracts covered by the new law include those between businesses where:

- one of the businesses employs less than 20 people, and
- the contract is worth up to \$300,000 in a single year, or
- \$1 million if the contract runs for more than 12 months.

A term will be unfair if it causes a significant imbalance in the parties' rights and obligations under the contract, is not reasonably necessary to protect the legitimate interests of the party who would benefit from the term, and would cause detriment to a party if it were relied on. The law sets out examples of contract terms that may be unfair, including:

- terms that enable one party (but not another) to avoid or limit their obligations under the contract
- terms that enable one party (but not another) to terminate the contract
- terms that penalise one party (but not another) for breaching or terminating the contract
- terms that enable one party (but not another) to vary the terms of the contract.

Only a court or tribunal (not the ACCC) can decide that a term is unfair. If a court or tribunal finds that a term is unfair, the term will be void – i.e. it is not binding on the parties. The rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term.

### ***ACCC Report on potentially unfair terms***

The ACCC Report details common terms of concern identified by the ACCC following its review of 46 contracts in seven industries, including advertising, telecommunications, retail leasing, independent contracting, franchising, waste management, and agriculture. After identifying a range of contract terms of concern, the ACCC engaged with businesses about amending or removing the problematic terms, resulting in a number of businesses making changes to their small business standard form contracts.

The ACCC identified that the three most common terms likely to cause concern were terms that allow the contract provider:

- to unilaterally vary all terms (or at least those that have a significant bearing on the contractual arrangement, or which could cause detriment if varied) in an unconstrained manner
- potentially broad and unreasonable powers to protect themselves against loss or damage at the expense of the small business by imposing broad indemnities or excessive limit on their liabilities
- an unreasonable ability to cancel or end an agreement as it suits them.

Interestingly, some of the other terms identified by the ACCC as being potentially unfair may come as a more of a surprise to some businesses, including:

- entire agreement clauses which state that the contract supersedes all previous agreements, undertakings and communications. The ACCC was concerned that such clauses could mislead a small business where they may have additional rights at law, e.g. based on pre-contractual representations made by the larger business
- automatic renewal clauses, e.g. allowing the agreement to be renewed every year on current terms. While automatic renewal clauses are not necessarily unfair, the ACCC considered that they could be of concern if they are not adequately disclosed, if no notice is provided that a contract is about to renew, if the supplier can change the cut-off date for cancellation of the renewal, or if the customer will incur large early termination charges if they cancel the contract after renewal.

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Other potentially unfair terms identified by the ACCC in specific industries included excessive early termination charges (telecommunications), excessive liquidated damages clauses and unreasonable restraints of trade (franchising), unrestricted rights to recover costs and rights to property without notice at the expiry of a lease (retail leasing), unrestricted rights to remove advertisements (advertising), and terms allowing unrestricted access to property (agriculture).

### ***The takeaway***

While the ACCC Report provides guidance on common terms likely to raise concerns in specific industries, it also serves as general guidance to businesses in other industries about the kinds of terms that the ACCC are likely to consider to be unfair – though ultimately this is for a court or tribunal to decide.

The new law has been identified by the ACCC as an enforcement priority. We encourage any business which has standard form contracts with small business to urgently review their contracts, to the extent that they have not already done so, for compliance with the new law. In particular, businesses should:

- consider whether they have any standard form contracts with small business
- review their relevant contracts to identify any contractual terms which are susceptible to being declared void for unfairness if challenged
- if the contract does contain terms that are potentially susceptible to challenge, consider if they should be amended or removed, having regard to:
  - whether the contract term creates an imbalance of obligations between the parties
  - whether the term is necessary to protect a legitimate business interest
  - whether it causes detriment to the other party if relied upon.

Businesses should also be aware that the regime not only applies to standard form contracts entered into after 12 November 2016, but also to existing contracts that are renewed, or to terms of existing contracts that are varied, after that date.

### ***Let's talk***

At PwC, we have developed an unfair contract terms matrix that will facilitate a systematic review of the contractual terms of your standard form contracts. For a deeper discussion of how these issues might affect your business, please contact:

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