



ACCC warns businesses time is running out to review their standard form contracts for unfair contract terms

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Australian Competition and Consumer Commission Deputy Chair Dr Michael Schaper says that he is concerned that many sectors remain unprepared for changes coming into effect in November when existing unfair contracts provisions for consumers are extended to include small businesses.

The ACCC says that small businesses enter into an average of 8 standard contracts a year. With more than 2 million small businesses in Australia, the ACCC anticipates this change will potentially affect millions of standard form contracts.

“The ACCC has engaged with many businesses during the transition period. I urge all businesses that issue standard form contracts to undertake a review of their terms in the lead up to November 12 to ensure that they are compliant with the new laws,” Dr Schaper said.

“Almost two thirds of small businesses have claimed to have experienced unfairness in the contract terms and conditions that they have signed up for and almost half report experiencing some harm as a result.”

Speaking at the Small Enterprise Association of Australia and New Zealand (SEAANZ) National Small Business Conference 2016 in Melbourne, Dr Schaper explained that the ACCC has prioritised education and engagement efforts towards a number of sectors including franchising, retail leasing, and independent contracting.

“The prevalence of standard form contracts in these areas means that these businesses should be taking full advantage of the transition period to understand their obligations and review their contracts. Our engagement to date suggests that there is still more to do before November 12,” Dr Schaper said.

The new law, which aims to protect small businesses from unfair terms in business-to-business standard form contracts, will apply from 12 November. Currently, many small businesses entering into contracts with larger businesses have no option but to accept all the terms of the standard form contract that they are given. Under this new law, the courts will be able to strike out any unfair contract terms.

“Some industries have responded swiftly to understand their new obligations when dealing with small businesses,” Dr Schaper said.

“Notably, the ACCC has engaged with the retail leasing industry, including the major shopping centre landlords, to review their standard form contracts. Our review revealed several areas of concern.”

Following contact from the ACCC, many landlords have amended these terms that allowed them a very high level of discretion in seeking costs from their small business retail tenants. The ACCC considered that terms which placed no limits on landlords seeking to recover their own costs from lessees in a variety of circumstances may be considered to be unfair contract terms under the new law.

Some leases also included terms allowing the landlord to unilaterally vary shopping centre rules such as trading hours. In response to the ACCC's concerns, most landlords have agreed to amend contract terms to limit the types of variations that the landlords can make.

"The quick steps that have been taken by the retail leasing industry are a guide for other sectors in adequately preparing for the new unfair contract terms law. All businesses should make an effort to understand how they will be affected by the law and whether it covers any deals they are engaged in," Dr Schaper said.

Background

The law will apply to a standard form contract entered into or renewed on or after 12 November 2016. If a contract is varied on or after 12 November 2016, the law will apply to the varied terms.

Contracts covered 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 a year.

Standard form contracts provide little or no opportunity for the responding party to negotiate the terms – they are offered on a 'take it or leave it' basis.

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. However, if a court or tribunal finds that a term is 'unfair', the term will be void – this means 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.

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