

## Severe Penalties under new Unfair Contract Provisions

Under the Australian Consumer Law (ACL) clauses in standard form contracts that are unfair may be declared void where one of the parties is a small business. There is no “big stick” which is forcing business to remove unfair provisions from standard contracts.

But this is likely to change. In particular, a significant monetary penalty for breach of the ACL is all but certain.

Currently, a standard form contract is one which is:-

- for the supply of goods or services or the sale or grant of an interest in land
- the upfront price payable under the contract is no more than \$300 000 or \$1 million if the contract is for more than 12 months and
- at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis).

Where a provision in a standard form contract is unfair, that provision can be declared void and of no effect. The sidebar on the right sets out some examples of unfair contract clauses.

Under the proposed law:-

- the upfront **price** payable under the contract will be **unlimited**
- A **small business** will be one which employs less than 100 people or has an annual turnover of less than \$10 million
- A **standard form contract** may include a template agreement and
- A clause may be **presumed to be unfair** if the same or a substantially similar term was found to be unfair in similar circumstances in a separate case.

If a provision is found to be unfair:-

- Civil penalties may be imposed and
- There will be an opportunity for alternative remedies.

The proposed amount of the civil penalties is not yet known.

However, the *maximum* civil penalty for companies under the ACL is currently the greater of:

- \$10 million; or

### “UNFAIR” CLAUSES

To be ‘unfair’, a clause must:

- cause a significant imbalance in the parties’ rights and obligations
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- cause financial or other detriment (such as delay) to a small business if it were relied on.

The following clauses have been found to be unfair.

1. A clause that **automatically renewed** a contract for up to 6 years unless the other side provided 6 months notice before the end of the contract.
2. A clause that allowed the company to **unilaterally increase fees**.
3. A clause that automatically increased the price for services on the contract being renewed **without negotiation**.
4. A clause that allowed one party to set the price **after the contract was signed**.
5. A clause which held a person **responsible for losses** suffered from a bad review published by then about the business on e.g. social media. Fair and accurate reviews are acceptable.
6. An indemnity clause that required compensation for loss or damage that the other side could avoid or mitigate.

- if the court can determine the value of the benefit obtained from the offence by the corporation (and any related bodies corporate) – three times the value of the benefit; or
- if the court cannot determine the value of the benefit – 10% of the annual turnover of the corporation

per contravention.

The maximum penalty for individuals is \$500,000.

**Next Steps:** All business must now review their “take it or leave it” contacts including any:-

- Sale of goods contracts
- Contracts for the provision of services
- Trading terms and conditions
- Hire agreements
- Construction contracts
- Website terms and conditions

to see if there are any unfair contract terms. If there are such terms or if you are unsure, then the only real option is to seek legal advice.

For more information or assistance, you can contact the author **Christine Jankus** on 1300 729 113 or by [email](#).

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November 2020

This advice in this Article may not be suitable to you because it contains general advice that has not been tailored to your personal circumstances. Please seek professional advice prior to acting on any information.

Questions or comments? E-mail us at [admin@jankuslegal.com.au](mailto:admin@jankuslegal.com.au) or call 1300 729 113.

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