

Small Traders Beware

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The intention of the Fair Trading Act 1996 (FTA) is to give businesses and consumers the confidence to participate in commerce by protecting their interests and allowing for effective competition.

In doing so the Act prohibits certain conduct relating to trade that is considered unfair or unjust, including prohibitions regarding deemed unfair contract terms.

The Fair Trading Amendment Act 2021 (FTAA) comes into effect from the 16th August 2022 and these unfair contract term provisions, which previously only applied to standard form consumer contracts between a business and a consumer/customer, will be extended to cover

small trade contracts in business to business relationships.

The purpose of these new provisions is to extend protection to include small businesses from any unfair contract terms in standard form contracts.

Do these changes apply to you?

A contract will be considered a small trade contract if:

- It is a standard form contract by which the parties are engaged in trade; and
- It has an annual value of less than $250,000 including GST when the business relationship is formed; and
- Is a fixed, non-negotiable, take it or leave it standard form contract.

The prohibition of unfair contract terms disallows clauses that are preferential to one party over the other. On consideration, a term will be deemed unfair if:

- It will cause a detriment to a party if applied, this could be financial or otherwise; or
- It causes a significant imbalance in the parties rights and/or obligations under the contract; or
- It is not reasonably necessary to protect the interests of the party who is or would be advantaged by the term.

An exhaustive list of examples of unfair contract terms can be found at section 19 of the FTAA, the Court has full discretion to determine whether a term is in fact *unfair*.

If a small trade contract term is considered unfair then a complaint can be made to the Commerce Commission. The Commerce Commission then has the ability to apply to the High Court (or District Court as the case may be) for a declaration that the term is indeed unfair. On consideration, if the Court is satisfied that the term fits the definition of an unfair contract term under the Act, then that term cannot be applied, enforced or relied upon. Further implications include monetary liability whereby if the trader is a body corporate they can incur a fine of up to $600,000 or alternatively where the trader is an individual, they can be liable for a fine of up to $200,000.

Please do note that the extension of the prohibition of unfair contract terms to small trade contracts will not apply to any contracts entered into prior to 16 August 2022, and additionally will not apply to relevant insurance contracts entered into before 01 April 2025.

If you are a trader that uses standard form contracts that fit the small trade contract description, we can assist you in making sure your standard from contracts comply with these new provisions.