

NEW UNFAIR CONTRACT TERMS AND UNCONSCIONABLE CONDUCT REGIME

The Fair Trading Amendment Act 2021 (“Amendment Act”) extends the existing prohibition on unfair contract terms in consumer contracts to standard form small trade contracts worth under \$250,000 (including GST). The Amendment Act also introduced a new prohibition on unconscionable conduct.

These changes will come into force on 16 August 2022 and affect standard form small trade contracts. A contract is a standard form small trade contract if it falls within the following definition:

- Each party is engaged in trade (ie two businesses);
- It is not a contract between a business and a consumer; and
- The relationship between the two parties in trade in relation to the goods, services or interest in land provided does not exceed the annual value threshold of \$250,000 (including GST) per annum for goods, services or an interest in land when the relationship first arises (ie when you first sign the contract).

Any contract signed prior to 16 August 2022 will not be subject to the new amendments. However, if the contract is varied, amended or renewed and it falls within the definition of a standard form small trade contract above then the new regime applies to the varied, amended or renewed contract.

The unfair contract terms previously only applied to contracts between a consumer and a business, for instance gym membership agreement. The new amendments will ensure that small businesses also receive protection against any unfair contract terms.

The following is taken into consideration when assessing whether a term is unfair:

- Whether the term would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- Whether the term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- Whether the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

The new amendments will not apply to the following contractual terms:

- Definition of the main subject matter of the contract.
- Setting the upfront price payable under the contract, so long as the price term is clear and unambiguous.
- Any terms that are required or expressly permitted by any legislation.

The extent to which the term is clear and the context of the contract as a whole will also be taken into account. However, the new amendments will not disadvantage a business that has a legitimate

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business interest and the term is necessary to protect that interest. At this stage the Commerce Commission has not updated its guidance regarding unfair contract terms but we assume this will be issued soon to assist businesses.

Penalties

The Commerce Commission can apply to a Court for a declaration that a term in a contract is unfair. If it is found to be unfair by a Court then that business must not include a term (or is amended with the Court's approval) or attempt to enforce or rely on the term. A business may also face:

- In the case of an individual fines not exceeding \$200,000 and a company a fine not exceeding \$600,000.
- Court orders stopping that business from applying or enforcing that term and or orders directing a refund or payment of damages.

Unconscionable Conduct

The unconscionable conduct in trade provisions are much broader as it applies to all conduct not just contractual terms. The term unconscionable conduct is not defined but the Amendment Act states that a Court can take the following into consideration:

- The relative bargaining power of the parties;
- The extent to which the parties acted in good faith;
- Whether the affected person was reasonably able to protect their interests; and
- Whether unfair pressure or tactics were used.

It may be that New Zealand will take guidance from Australian cases but at this stage no guidance or comment has been provided by the Commerce Commission.

Penalties

The Commerce Commission can seek penalties and fines as above. The Commerce Commission could also could bring civil proceedings; for example seeking a declaration from the Court in relation to unfair contract terms. The remedies include damages, injunctions and other Court orders.

Conclusion

Whether the new amendments apply to any contract will depend on whether it falls within the definition of a standard form small trade contract. When looking at the annual value threshold this is assessed when the relationship first arises.

The unconscionable conduct provisions are much broader so you should review your contracts now to see if any clauses should be amended prior to 16 August 2022.

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