Don’t let unfair contracts bring your business down

While protection for consumers entering into a standard form contract has existed for many years, in 2016 similar protections were introduced for small business owners with fewer than 20 employees*.

Did you know that your average Australian small business signs eight standard form contracts per year? Which is why it’s so important to know your rights when entering into a standard form contract, or providing a contract to others.

What’s a standard form contract?

While not defined in the Australian Consumer Law, a standard form contract in general terms is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms – that is, it’s effectively offered on a ‘take it or leave it’ basis.

If a dispute arises, an agreement is assumed to be a standard form contract, unless the party that prepared it can prove that it’s not. Ultimately, only a court or tribunal can decide that a term is unfair.

What’s an unfair contract term?

The law sets out examples of terms that may be deemed ‘unfair’, including where only one party:
- holds all, or the majority of power under the contract
- can terminate the contract
- is penalised for breaching or terminating the contract
- can vary the terms of the contract

Retail lease contracts

Retail lease clauses that could be impacted by the amendment to unfair contract terms include:
- Rent reviews
- Length of lease
- Power of attorney provisions
- Damage abatement
- Guarantee and indemnity provisions
- Level of insurance cover
- Relocation provisions
- Make good obligations
- Terminations
- Fit out regimes

*(Currently in Western Australia, the protections apply only if at least one party to the contract is incorporated eg a Pty. Ltd. company. This may be amended in the future.)
Is my business covered?
Protections apply to small businesses with fewer than 20 employees, that have entered into standard form contracts on or after 12 November 2016.

Which contracts are covered?
Protections only apply:
- when the upfront price payable under the contract is under $300,000 (for contracts of less than 12 months), or under $1 million (for longer contracts)
- to contracts entered into, or amended, on or after 12 November 2016
- to contracts that are automatically rolled over on, or after, this date

Some contracts are excluded eg. those related to shipping and car insurance.

What should I do if I’m offered an unfair contract to sign?
- Attempt to negotiate the unfair elements out of the contract.
- Talk to the SBDC.
- Contact the ACCC’s small business helpline 1300 302 021.
- Seek legal advice.

Example

Advertising services
Numerous small business owners have complained that an advertising company’s contract contained an automatic rollover clause under which the agreement renewed every year.

This clause could be considered unfair if:
- It was not adequately disclosed.
- No notice was provided that the contract was about to renew.
- The customer would incur large termination charges if they cancelled after the contract was automatically renewed.

For more information visit smallbusiness.wa.gov.au or call 133 140

NOTE: THIS INFORMATION IS NOT A SUBSTITUTE FOR LEGAL ADVICE