



How can you avoid unfair contract terms?

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Business is booming, however...

Have you heard about Prospa? This startup shot to Australian Financial Review fame in early June this year. It is an online lender which offers unsecured business loans to small businesses which big lenders consider to be too risky. Their own business was going remarkably well. So well in fact that Prospa was getting ready to take the ASX by storm and launch an IPO. The excitement was surely palpable, the founders would have been so proud of themselves and their strong team for getting to this point. The dollars were about to roll in!

And then, right before the IPO was about to take place, ASIC raised concerns purportedly regarding Prospa's potentially unfair contract terms. This is not surprising given the climate of industry-wide reviews of lending practices. This concern led to postponement of the IPO on 6 June 2018, only 15 minutes prior to launch. A \$576 million dollar ASX float on hold, indefinitely, whilst these standard form contracts were scrutinised. The issue? Potentially unfair terms in their standard form contracts contrary to the Australian Consumer Law.

Could this be you?

ASIC was subsequently satisfied with the suitability of Prospa's contracts, and the business itself is still going strong. However, this is not the position a business on the brink of massive progress wants to find itself in. And if standard form contracts are integral to your business we don't want that for you either, at any stage in your business. This article will provide you with some key drafting concepts to ensure your contracts don't contain unfair contract terms.

What is the law surrounding this?

The Australian Consumer Law regulates a variety of contractual relationships. One important role is the protection of individual consumers contracting with businesses. Another involves business to business ("**B2B**") contracts where at least one party is a "small business" (ie one which has a max of 20 employees, which can include casuals.) We will focus on the B2B relationships.

What is all the fuss about?

Let's say you have a business, and your standard form contract has been on offer for several years. Although you have heard rumblings of small business clients not entirely happy with the terms, they wanted the service you provide, and just dealt with it. In your mind, they could either choose to sign or not sign - they decided to sign. So that's that. Also, as of

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this year (2018) you have signed on a few more clients, and renewed a couple of old contracts, too. This “fairness” thing isn’t something you have worried about, and your contract was prepared by a lawyer, so there are no issues, right? Not necessarily.

Some major legal changes have been happening in the regulation of B2B contracts, and they affect you. These came into effect on 12 November 2016, so even if your contract was prepared by a lawyer who complied with the existing industry and legal expectations, the position on your contract may have changed. If a court declares that a term of your standard form contract is unfair, then the offending term will be void and excised from the remainder of the contract. Any such decision will also affect your existing agreements. Although penalties are not imposed on businesses with contracts deemed to contain unfair terms, the business whose contract is not compliant will likely have to pay the costs of the court’s decisions, and deal with any subsequent PR fall out.

Are you a finance business?

The banking royal commission has resulted in a cloud of distrust in the finance world, which in our view is undoubtedly one of the factors leading to ASIC’s query of Prospa’s contracts. If your business operates in the finance industry, take particular note of our recommendations below, as ASIC has its eye on this sector.

What sort of contracts do these B2B regulations apply to?

The protection against unfair contract terms applies to standard form contracts with small businesses which are:

- offered on a ‘take it or leave it basis’, and
- entered into or renewed on or after 12 November 2016, and
- which are for a maximum [upfront price payable](#) of \$300,000 (for contracts less than 12 months) or maximum \$1 million (for contracts longer than 12 months). (This upfront price payable includes all of the amounts disclosed prior to entering the contract that the paying party will have to pay for the duration of the contract, including contingent payments disclosed upfront).

How can I avoid unfair contract terms?

Do your business’ contracts meet the above criteria? If so follow these Do’s and Don’ts to protect against your standard form contract being held “unfair”. Alternatively, have you signed or been offered a contract like this? Take note and make sure you don’t end up signing an unfair contract. We regularly draft and review standard form contracts, and these are the key “fairness” considerations we keep in mind:

Do’s:

- Do consider what is reasonably necessary to protect your *legitimate interests* under the contract, and only include terms which are reasonable, and not excessive.
- Do consider the contract as a whole, and the relative positions of power between the parties. Some aspects which are potentially unfair may be balanced out as a whole...but this could be a risky approach.
- If appropriate, give **both** parties the right to vary the terms of the contract.
- If allowing for early termination, give the right to **both** parties.
- If including a penalty for breach of terms or terminating the contract, impose the penalty on **both** parties.
- Make sure that the contract uses reasonably plain language, is legible, presented clearly, and is readily available to any party affected by a particular term.
- If allowing for some limitation or avoidance of obligations under the contract, ensure that these rights are balanced between the parties.
- Limit the scope of broad indemnification clauses and

Don’ts:

- Don’t include terms which go above and beyond what is necessary to protect your *legitimate interests*, particularly where this is to the detriment of the small business signing.
- Don’t include terms which will result in a significant imbalance in the parties’ rights and obligations.
- Don’t give one party the unilateral right to vary the terms of the contract, and not the other party.
- Don’t allow one party to terminate early, and not the other party.
- Don’t impose penalties on one party for breaches or early termination, and not the other party.
- Don’t rely on fine print or put too many terms in schedules which ought to be in the body of the contract. And don’t use too much legal, complex or technical language, unless absolutely necessary.
- Don’t include terms that allow one party to avoid or limit their obligations under the contract, and not the other party.
- Don’t include terms which, if relied on by

be specific if a particular form of indemnification is important to you and your *legitimate interests*.

- If you are including automatic renewal clauses, follow [this article](#) from ClarkeKann to ensure yours are reasonable.
- Do seek assistance if you are unsure whether your contract terms may be considered unfair.
- you, will cause detriment to the small business signing.
- Don't include unreasonable automatic renewal clauses.
- Don't get to the end of this article and completely neglect to take action. Think about your contracts and make sure you won't get caught out.

What do I do now?

Armed with this knowledge you can take a look at your standard form contracts, both the ones you present to small business customers, and the ones you sign yourself as a small business. If you have any concerns about those contract terms, please contact us. We can:

1. review contracts for you;
2. assist with identifying and fixing unfair terms; and
3. draft whole new contracts to put into action.

For more information, please contact:



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