

FANFARE OR BUGBEAR? – AN UNFAIR CONTRACT TERMS AFFAIR

No one wants to make a bad deal, and definitely no one wants to be forced into a bad deal. That's just not fair. In recent years there has been an increasing push to tackle this issue with new laws specifically targeting and punishing people who force or manipulate others to enter a bad deal.

At first, these laws were more focussed on contracts with unfair terms that were issued by big business. Contracts where the terms are "take it or leave it" and the nature of the business or a lack of reasonably priced alternatives meant that people had to take it. As time passed however, it became apparent that the "take it or leave it" approach works in lots of circumstances and for business operators big and small.

This is why we now have new laws (found in The Australian Consumer Law) devoted to ending existing unfair contracts and preventing the creation of new unfair contracts.

There are two broad questions that are asked to determine whether a contract is unfair. Is the contract a "standard form contract"? Are the terms of the contract unfair?

A standard form contract that has unfair terms within it can be deemed void (terminating the contract as if it never existed) or the unfair terms in the contract can be individually deemed void (removing just those affected clauses from the contract).

A "standard form contract" includes contracts that are entered into where:

- one party had most or all of the bargaining power; or
- the contract is a repeat of a contract one party has previously entered into; or
- the contract was prepared before the parties negotiated the terms; or
- a party to the contract was not given an effective opportunity to negotiate the terms; or
- the terms of the contract don't take into account the specific characteristics of a party or the transaction.

A term in a contract is considered unfair when:

- it imbalances the rights and obligations of the parties; and
- it isn't reasonably necessary to protect the interests of the party it benefits; and
- it will cause a detrimental effect to a party when it is put into effect.

Examples of unfair contract terms include:

- only one party holding a right to terminate;
- clauses that penalise a party when the contract is terminated;
- clauses that allow one party, but not the other, to change the terms of the contract or the prices paid under the contract;
- clauses that don't allow a party to terminate when the services delivered or prices charged by the other party are changed unilaterally;
- clauses that let one party alone determine if the contract has been breached or is terminated; and
- clauses that prevent a party from suing another party to recover damages.

In the context of a typical Management Rights business there are two types of contracts that can easily fall within the scope of a “standard form contract” and therefore managers need to be aware of the risks associated with having unfair terms in these types of contracts – namely, off the plan caretaking agreements entered with the Body Corporate and letting appointments entered with lot owners.

Off the plan caretaking agreements are contracts that are typically prepared by the developer before the Body Corporate exists and are entered into without the Body Corporate having much chance to negotiate the terms. If you are buying a Management Rights business off the plan and the caretaking agreement appears to significantly favour the manager, there is a real risk that some or all of the agreement could be deemed void in the future – i.e. if it seems too good a deal for the manager to be true, it probably is. In these circumstances the damage has potentially been done before you were involved in the building and so it’s highly recommended you seek legal advice to hopefully remove or at least reduce the risks you may be vulnerable to.

Managers have far more control over the contents of their letting appointments, even when they have been inherited from a prior manager. Be aware that if there are unfair terms in a letting appointment this will affect the current manager, even if the terms of the appointment were originally prepared by a prior manager.

Potential unfair terms to look out for with a letting appointment include:

- Having a right to change prices without the owner having a right to terminate before the new prices take effect.
- Creating and charging for new services that aren’t detailed in the letting appointment.
- Having a right to charge a fee or otherwise penalise the owner if they terminate the letting appointment early.

If you have some problematic clauses in your letting appointments it is worth seeking legal advice to see if you should amend those clauses and remove the unfair elements. Be aware though that a clause can look unfair when it is reviewed on its own out of any context, but it doesn’t necessarily mean that it will be an unfair clause when considered in the context of the entire contract and the transaction it relates to. Decisions on whether a clause is unfair or not are not always black and white. This is one of those times where the vibe of it really does matter.

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