

Franchisors should be aware that changes to the Fair Trading Act 1986 (FTA) are now in force which mean that all standard form business to business contracts with an annual threshold value under \$250,000 (including GST) will be subject to the same unfair contract terms rules that already apply to business to consumer contracts. Set out below is a brief summary of the application of the unfair contract terms rules to franchise documentation. For more detail, please see our top 10 things to think about article [here](#).

WHAT CONTRACTS ARE AFFECTED?

Standard form contracts where the value is expected to be \$250,000 (including GST) or less in any 12 month period are defined as *small trade contracts* under the changes to the FTA. The new rules apply to all new small trade contracts entered into on or after 16 August 2022 as well as any existing small trade contracts renewed or varied on or after that date.

WHAT TERMS ARE UNFAIR?

Terms considered unfair are those that:

- cause a significant imbalance in the parties' rights and obligations under the contract;
- are not reasonably necessary to protect the legitimate interests of the advantaged party; and
- the terms would cause detriment to a party if they were applied, relied on, or enforced.

Potentially unfair terms are those that:

- allow one party to unilaterally vary the contract;
- place risk on a party for events outside their control;
- penalise one party (but not the other) for a breach of the contract;
- allow termination for non-material breaches;
- limit a party's ability to terminate the contract;

- allow one party to vary the upfront price payable under the contract without giving the other party a termination right.

WHAT ABOUT FRANCHISE DOCUMENTS?

Franchise agreements will be small trade contracts unless their annual value exceeds \$250,000 (including GST) per year. Other agreements with franchisees and prospective franchisees, and related documentation are also likely to be affected. Standard form B2B contracts / terms for sale or purchase of goods or services may also be affected.

WHAT SHOULD I DO?

Franchisors should check if their franchise agreements, other franchise documentation and any of their standard form contracts are small trade contracts under the FTA. If they are, they should review them for unfair contract terms. Any unfair contract terms should be amended so that they are no longer unfair or removed from the contract.

HOW CAN I LEARN MORE?

The Commerce Commission has updated its guidance on the unfair contract terms rules as they applied to standard form consumer contracts to reflect the extension of the regime to business to business contracts. The guidance can be accessed [here](#).

For help and advice please contact your usual Jackson Russell Business Law advisor or one of the team below.

KEY JACKSON RUSSELL CONTACTS

Darryl King PARTNER
BUSINESS LAW TEAM

DDI +64 +64 9 300 6935 | M +64 021 326 087

E darryl.king@jacksonrussell.co.nz

David Alizade PARTNER
BUSINESS LAW TEAM

DDI +64 9 300 6 937 | M +64 021 224 8055

E david.alizade@jacksonrussell.co.nz

Isabel Jenner SENIOR ASSOCIATE
BUSINESS LAW TEAM

DDI +64 9-300 6913 | M +64 021 132

5853

E isabel.jenner@jacksonrussell.co.nz



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