

**Submission written by:
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1. How widespread is the use of standard form contracts for small business and what are their benefits and disadvantages?

The use of standard form contracts is widespread for small business. We used them in the form of employee contracts, contracts for outsourced cleaning, rubbish removal, financial and accounting services. Other contracts included leaseholds, bank loans and suppliers or manufacturers of goods.

The benefits of a standard form contract provided us with a cost effective, time efficient tool, saving the business the need to continually create contracts which can be costly in time and resources. Many of the contracts were negotiated between us and the suppliers of the goods or services. The disadvantages of a standard form contract can be that some contractors may use their market power and affiliated partnering organisations to create contracts which displace the balance of power between the parties engaged in the contract.

2. What considerations influence the design and terms and conditions in standard form contracts?

When we dealt with contracts we looked at length of contract, penalties, and specific terms within the contract. We believe that perhaps value of contract or market position of corporation offering the contract may influence some terms and conditions within a contract.

3. To what extent are business reviewing standard form contracts or engaging legal services prior to signing them? Does this depend the value or perceived exclusivity of the transaction?

We believe the value/price of a business is a major factor in the decision to obtain legal advice to review contracts prior to signing them.

Through reviewing the contract you gain awareness of any possible risks and attempt to negotiate any changes. In majority of cases the contract is normally in favour of the contract holder and any changes are very rare and is often stated as 'take it or leave it' in attitude by the contract holder/creator.

Due to the expensive nature of legal advice businesses are reluctant to engage legal services. Our experience with bank contracts were certainly in favour of the bank and did not allow or agree to any changes, it was certainly offered as an exclusive transaction and any potential change may have diminished their control over the business. However other standard form contracts, like supply or retail liquor branding were negotiable.

We employed qualified accountants who have vast experience in this particular industry and with like business for many years and are still in business today. Along with our accountant we tried to negotiate the contract with the bank only to be back to square one once again with the attitude 'take it or leave it' this is the banks contract. The accountant stated at the time, he had never experienced this kind of action in over 30 years of acting in this role.

Most Australians would like the opportunity to own and run their own business and it would seem that the banks use the fact that the majority of people do not have experience with contracts, or often the resources to fully understand and therefore use this strategy to control all of the negotiations of the contract. They know full well your position as far as borrowing is concerned and they use this to their advantage.

4. To what degree do small businesses try to negotiate standard form contracts?

In the majority of cases businesses try and negotiate standard form contracts. We negotiated with employees, suppliers, the holder of the freehold and accounting services. However when it came to the bank contract, even investing in senior lawyers to navigate the contract there was absolutely no negotiation allowed.

5. Is it the terms or the process by which some contracts are negotiable that is the main concern for small business?

For us it was both the terms on the bank contract and also the process. The terms of the contract were non-negotiable even with expert opinion and contribution. And at certain stages the process also became a concern, where the contract holders (bank) were able to act in bullish tactics and use the process to intimidate us.

6. How do small businesses differ from consumers in relation to their interaction with standard form contracts?

Small businesses we believe certainly differ from large corporations or the wealthy. It seems unless you have a lot of money, or are in a powerful position, the interaction with contracts is different.

We also believe they are easier targets versus consumers, as they are a smaller percentage of users.

7. What terms are businesses encountering that might be considered ‘unfair’?

Terms around the valuation of the business or asset can be unfair and particularly when they utilise the services of their own valuation representatives rather than those offered independently.

It also seems that some of the terms around the end or cessation of the contract are unfair and are often at the discretion of the contract holder (bank) Terms on the imposing of fines based upon loan value ratios are also unfair, why be penalised when making payments, only to be hit with additional costs for not reaching LVR and yet all other components are paid.

8. What detriment have businesses suffered from unfair contract terms?

During negotiation of our contract we had legal advice on several points but were advised it would be all in vain as this was the banks contract and you had to ‘take it or leave it’. A point of interest was that we had no choice on which the company would be that carried out the valuations on the business as well as properties, we had our preferences but were told we had to use the companies aligned to the bank.

We had been trading for 6 months from start of business when the bank advised us that the value of the property had diminished and we had to make choices. We had a contract for 3 years with the right of refinancing for a further negotiated term.

There was nothing in the contract to say that the bank could devalue our asset without the proper valuation representative although we would have had to use the company aligned to the bank...this gives them (bank) control to value at what they desire so as to have control over the contract you have and use this as a leverage in whatever way they want.

This gives the banks complete control over you and they use this to pressure you into doing what they want, not what you would like, to negotiate with them for an outcome that could be beneficial to all.

The big banks hold all the cards, all contracts lean their way with no negotiations available to the small business... 'take it or leave it' and this really put into action when most or all of your negotiating ability has gone, once again controlled by the contract holder (bank).

The bank entices you with fine bottles of red wine for our accountant to get our business, then acts in the most appalling, bullying way.

9. What protections do businesses currently have when they encounter unfair contract terms and are they sufficient?

Depending on the holder of the contract, like suppliers of goods and services, we were able to negotiate on potentially unfair contract terms, or engage legal advice or support to address any unfair terms. But when dealing with a bank contract, there is absolutely no recourse or no negotiation on any unfair terms. Even engaging legal representation and advice did not provide any protection.

When the Commonwealth Bank bought out the bankrupted Bankwest, they sent a Bankwest Regional Rep to see us to tell us that the CBA has bought Bankwest, and be assured nothing will change, they advised that Bankwest will operate under the same name, and business as usual with us.

We continued to run a successful business, paying staff, paying stock, conducting our business normally, and then the bullying and intimidation tactics started and everything changed.

We learnt that CBA had identified loans across Australia that they wished off their books, and we were one of them, so henceforth the pressure to get us gone commenced. Protection from unfair terms, none, we had to try and carry on running our business, while getting bullied, and seeing medical doctors for our health, we couldn't sleep, eat, or function properly, all because of the CBA, we are completely ruined, lost everything, now on a government pension, after being successful business people all our life

10. What regulatory response are already in place that aim to protect small business from unfair contract terms and how effective are these mechanisms?

It seems that the regulatory responses like ASIC, State and Federal Members, FOS are not effective in protecting small businesses. They are hard to contact, they have ignored all communications. It feels like unless you are a large corporation or have a potential media presence, then we are easily ignored. Often it also feels like being pushed in multiple directions, register with this body and that body, all to no avail.

For banks in particular there seems to be no regulatory response in place, they seem to be a law unto themselves, nothing fair, nothing just and very manipulative.