

This is a reminder that a significant change is on the horizon for companies using standard form contracts in Australia. These matters were raised in the November 2022 edition of [Construction Matters](#).

New unfair contract terms (UCT) reform is set to take effect from 9 November 2023, ushering in a pivotal shift in the contracting landscape. The reform aims to bolster consumer and small business protection by curbing UTC, ensuring a fairer playing field for all parties.

Companies should carefully review and potentially amend their standard contracts to ensure compliance with the upcoming changes and avoid the risk of hefty penalties under the Australian Consumer Law (ACL).

Background

In 2016, the UCT provisions within the ACL were amended to bridge the evident power imbalance between small businesses and larger counterparties when entering into standard form contracts for the supply of goods or services. However, the existing provisions have often been said to lack a significant degree of deterrence to large companies from using unfair terms in their standard form contracts.¹ Consequently, unfair terms remained in such contracts, allowing large companies to retain their advantageous negotiating positions against small businesses.

On 9 November 2023 the UCT provisions will incorporate changes proposed and approved in the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth) (Amending Act). Although the general nature of the provisions does not change, the Amending Act significantly widens the application of the UCT provisions and imposes large penalties for contravention.

Who Is Impacted by the Changes?

Companies that issue pre-written template contracts to a party who is a consumer or a small business are likely to be impacted by the changes.

The UCT provisions will apply to:

- ✓ Standard form contracts
- ✓ Where a party is a consumer or a small business

What Is a Standard Form Contract?

A standard form contract is understood to be a contract prepared by one party that is issued to the other party in circumstances where the terms and conditions are not normally able to be negotiated or amended.

Under the current ACL provisions, the factors a court must consider in determining whether a contract is a standard form contract are:

- Whether one party has all/most of the bargaining power
- Whether the contract was prepared by one party before any discussion between the parties
- Whether one party was required to accept or reject the contract in the form presented
- Whether there was an opportunity to negotiate the terms of the contract
- Whether the contract takes into account the specific characteristics of the other party or the transaction
- Any other factors it considers relevant

The Amending Act expands on the existing factors by inserting an additional consideration – whether the party who prepared the contract has made other contracts that are the same or similar, and the number of times a same or similar contract has been used.

The Amending Act also clarifies that a contract may be a standard form contract despite:

- The party receiving the contract having the opportunity to negotiate minor or insubstantial changes
- The party receiving the contract having the ability to select terms from a range determined by the party that prepared the contract
- The party that prepared the contract negotiating with a third party over the same or similar relevant contract

¹ Dr Andre Leigh, MP – Second Reading Speech on 28 September 2022.

Small Business

One important change for companies to note is the adjustment to the threshold of what is considered a small business for the purposes of the UCT provisions.

A small business under the UCT provisions is now a business with:

- Fewer than 100 employees (excluding non-regular casuals and assessed pro rata for part-time employees)
- Adjusted turnover of less than AU\$10 million

This is a significant threshold increase from the existing provisions where the employee figure for a small business is fewer than 20 employees (excluding casuals).

If either of the parties to a standard form contract is considered a small business based on the above, the contract will be considered a small business contract and the UCT provisions will apply. The Amending Act also removes any contract value thresholds that previously narrowed the scope of the UCT provisions. As such, the only financial parameters defining the application of the UCT provisions are those that define a small business.

The amendments mean that a much larger number of consumers and businesses will be captured under the UCT provisions.

Along with the wider coverage is the increased bite the Amending Act introduces to the UCT provisions. The key change is the introduction of civil penalties for a business that:

- Makes or drafts a small business standard form contract with an unfair term in it
- Applies or relies on, or seeks to apply or rely on, an unfair term in a standard form small business contract

The maximum civil penalty for a body corporate contravening the UCT provisions in relation to new or renewed contracts from 9 November 2023 will be the greater of:

- AU\$50 million
- Three times the value of any benefit derived from the relevant breach
- 30% of the concerned company's adjusted turnover during the relevant period

The civil penalty for an individual contravening the updated UCT provisions is AU\$2.5 million.

What Is an “Unfair” Term?

The ACL states that a contract term in a standard form contract is unfair if it:

- Would cause a significant imbalance in the parties' rights and obligations under the contract
- Is not reasonably necessary to protect the legitimate interests of the advantaged party
- Would cause detriment to a party if applied or relied on

Taking the above into consideration, whether a term is considered unfair highly depends on the context of the contract. As such, it is difficult to categorically identify clauses in standard form contracts that will be deemed unfair.

The ACL provides some assistance by providing a list of types of clauses that may be unfair, for example:

- A term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract
- A term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract
- A term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract
- A term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract
- A term that limits, or has the effect of limiting, one party's vicarious liability for its agents
- A term that limits, or has the effect of limiting, one party's right to sue another party

Recent case law and ACCC enforcement outcomes can also provide insights on what may or may not be considered unfair.

In the case of *Carnival PLC and Another v Karpik*,² the Federal Court found that a class action waiver clause in a cruise contract for the Ruby Princess was not an unfair contract term for the purposes of the ACL. The reasons were that the clause did not tilt the rights and obligations under the contract in the cruise operator's favour, and the cruise operator had a legitimate interest in avoiding the burden of class actions brought against it. Also relevant was that the relevant clause was brought to the attention of those suffering the detriment of it.

In *ACCC v Fujifilm Business Innovation Australia Pty Ltd*,³ the Federal Court found that a number of terms in Fujifilm's standard goods and services contracts were unfair. The ACCC commenced proceedings seeking declaratory and injunctive relief, as well as requiring Fujifilm to communicate and correct its template contracts, and enter a compliance program.

ACCC and Fujifilm eventually agreed consent orders after mediation that their template contracts contained unfair terms.

Some examples of these unfair terms are:

- Unilateral price variation clauses
- Automatic renewal (without notification) clauses
- Customer having to pay Fujifilm all costs and expenses Fujifilm incurs in exercising its rights under the contract on a full indemnity basis, but no corresponding right for the customer and no requirement on Fujifilm to minimise costs
- Fujifilm retaining ability to suspend the provision of services if the customer breaches the contract, but still requiring the customer to pay for the services
- Immediate termination clause if the customer breaches the contract with no corresponding right for the customer and no right for the customer to remedy their breach
- Requirement of payment from the customer to Fujifilm for the goods or services if Fujifilm terminates the contract
- The ability to invoice the customer regardless of whether the goods or services had been delivered

Takeaways

It is essential for companies to be aware of the evolving legal and contracting landscape. The upcoming changes to UCT legislation have significantly expanded its reach and will impact a much broader spectrum of companies. Notably, the revised definition of small business now encompasses a larger pool of businesses, which will impact the contracting relationships of many larger project participants and is likely to apply to many construction industry subcontracts. Further, the substantial penalties for non-compliance necessitate a review of internal standard form contract templates to avoid potentially severe financial consequences.

Our team remains ready to engage in discussions about the upcoming changes and their potential impact on your business. We can also assist with identifying and taking proactive measures to mitigate any compliance risks related to the UCT provisions.

Author



Melissa Koo

Partner, Perth

T +61 8 9429 7568

E melissa.koo@squirepb.com

³ [2022] FCA 928.