

## The Amendments in Outline

On 9 November 2022, the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 commenced. This legislation substantially strengthens the provisions of the Australian Consumer Law (ACL) in relation to unfair contract terms (UCT) in two ways:

- First, the Act broadens the scope of the UCT regime, particularly through the expansion of the definition of “small business.”
- Second, the Act creates significant penalties for UCTs in standard form contracts with consumers and small businesses, as well as the reliance on them. Currently, while UCTs are void, there are no penalties.

The Act provided a one-year transition period before the reforms commence. In light of the lengthy grace period, it can be expected that the Australian Competition and Consumer Commission, (ACCC) will look for opportunities to robustly enforce the amended law immediately on its commencement.

The consequences of breaches will be significant. The maximum penalty for a breach is now at least AU\$50 million for corporations, with separate conventions for proposing an UCT and applying or relying on UCTs.

Our team is ready to assist you should you require any further information on these developments.

## Broadening the Application of the UCT Provisions

The underlying principle that the UCT provisions apply only to “consumer contracts” or “small business contracts” is unchanged. However, the definition of “small business contract” has been broadened considerably.

Currently, a “small business contract” requires a party to the contract be a business that employs fewer than 20 persons, and it to be for an upfront price of not exceeding AU\$300,000 or be a long-term (more than 12-month) contract with an upfront price not exceeding AU\$1 million.

From 9 November 2023, the upfront price requirement has been removed. Instead, at the time the contract is made, one party must have fewer than 100 full-time equivalent employees or have a turnover of less than \$10 million.

## Penalties for Making or Relying on UCTs

UCTs will continue to be void.

In addition, the Act introduces significant civil penalties for those parties who propose or rely on UCTs. The penalties are in line with the civil penalties applicable to unconscionable conduct, indicating the seriousness with which UCTs are now regarded.

For corporations, the maximum penalty is the greater of \$50 million, three times the value of the benefit from the contravention (if it can be determined), or 30% of an adjusted turnover during the contravention period (at least 12 months).

For individuals, the maximum penalty will be \$2.5 million.

A separate contravention will occur for each separate unfair term proposed in a contract, meaning that the maximum penalty can quickly escalate – particularly for corporations with large turnover who have included multiple unfair terms in standard contracts.

## Terms of Particular Concern

Businesses should pay particular attention to below clauses as they may potentially constitute an unfair contract term:

- Variation provisions that allow a party to unilaterally vary the terms of the contract or the scope of works at any time without the need of giving proper compensation to the other party
- Indemnity clauses that excessively extend liability beyond what would reasonably be necessary to adequately protect a party against loss or damage
- Limitation or exclusion of liability clauses that exclude or disproportionately limit the liability of a party even if they are partially at fault
- Termination clauses allowing a party to cancel the agreement at any time “for convenience” and without reason or default by the other party
- Entire agreement clauses or terms that imply that a party has no recourse to remedies outside the terms of the contract
- Time bars that may provide onerous timeframes and notification procedures for parties to claim variations or an extension of time under the contract
- Principal discretion clauses that purport to give a party the exclusive power to determine certain terms of the contract, for example, whether a term has been breached or whether work is considered defective.

In determining whether a term of a contract is unfair, the court considers the contract as a whole and takes into account the extent to which the term is transparent (i.e. expressed in plain language, is legible, clearly presented and readily available to any party affected by the term) and any other matters it considers relevant.

## Summary of Changes

An overview of the key changes is summarised below.

	Current law	Proposed law
<b>Penalties for UCTs in Standard Form Contracts</b>	None. There is no civil penalty provision.	Civil penalties apply for making a contract which includes a UCT. Each UCT included is a separate contravention.  Civil penalties apply for applying or relying on, or purporting to apply or rely on, a UCT.
<b>Other Remedies and Orders</b>	The term is deemed void; however, the contract will continue to operate if it is capable of operation without the UCT.  The court may make compensation orders in favour of a person who has suffered, or is likely to suffer, loss or damage.	In addition to current powers, the court may make orders to void, vary or refuse to enforce all or part of the contract to redress loss or damage, or prevent or reduce likely loss or damage.  The court may also make preventative orders and prevent the same or a substantially similar term from being made in any current contract the person is party to, or any future contract the person will be a party to.
<b>Small Business Contracts</b>	At the time the contract is entered into, at least one party is a business that has fewer than 20 employees.  The upfront price payable under the contract must either be: <ul style="list-style-type: none"> <li>• AU\$300,000 or less</li> <li>• If the contract has a duration of more than 12 months, AU\$1,000,000 or less</li> </ul>	At the time the contract is entered to, at least one party is a business that satisfies either or both of the following: <ul style="list-style-type: none"> <li>• Fewer than 100 full-time equivalent employees</li> <li>• Annual turnover (with some exceptions) less than AU\$10 million</li> </ul> No upfront price requirements.
<b>Standard Form Contracts</b>	In determining whether a contract is a standard form contract, the court must consider the following factors, in addition to matters it thinks relevant: <ol style="list-style-type: none"> <li>(a) Whether one of the parties has all or most of the bargaining power</li> <li>(b) Whether the contract was prepared by one party before any discussion occurred</li> <li>(c) Whether another party was, in effect, required either to accept or reject the terms of the contract</li> <li>(d) Whether another party was given an effective opportunity to negotiate the terms of the contract</li> <li>(e) Whether the terms of the contract take into account the specific characteristics of another party or the particular transaction</li> <li>(f) Any other matters set out in regulations.</li> </ol>	In addition, the court must consider whether a party has entered into a contract that is the same or substantially similar to another contract entered into by that person and the number of times this has been done.

	Current law	Proposed law
<b>What is Unfair</b>	<p>A term in a standard form contract is considered unfair if the term:</p> <ul style="list-style-type: none"> <li>• Would cause a significant imbalance in the parties' rights and obligations arising under the contract</li> <li>• Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term</li> <li>• Would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on</li> </ul>	Unchanged

## Key Contacts



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