

THE CLOCK IS TICKING:

Major reforms to Australia's unfair contract terms regime will commence later this year – what do they mean for your business?

*Businesses now have until **9 November 2023** to remove or change terms that may be considered 'unfair' in their standard form contracts used with consumers and small businesses, or to consider whether they would rather provide the counterparty with an effective opportunity to negotiate the contract.*

Introduction

Changes to the unfair contract terms (UCT) regime have now been enacted via amendments to the *Australian Consumer Law (ACL)*. These changes will take effect on **9 November 2023**.

The changes introduce significant reforms, including:

- a.** prohibiting unfair terms in standard form consumer and small business contracts,
- b.** broadening the scope of the UCT regime by expanding the definition of "small business contract", and
- c.** clarifying what is a standard form contract, and when a party has been given an effective opportunity to negotiate a contract.

In addition to the strengthened UCT regime, the maximum penalties for contraventions of the ACL have also been drastically increased (please see below). These increases are already in effect – they apply to relevant conduct occurring on or after **10 November 2022**. Once the prohibitions on unfair contract terms come into force in November 2023, these new maximum penalties will also apply where the UCT prohibitions are contravened.

Australia’s current UCT regime – A recap

The UCT regime under the ACL applies to “consumer contracts” and “small business contracts”, provided the contracts are also “standard form contracts”.

The ACL does not define a “standard form contract”, but if a party alleges that a contract is a standard form contract, it is presumed to be one unless the other party proves otherwise. In determining whether a contract is a standard form contract, a court is required to take into account certain matters, including whether one party has all or most of the bargaining power relating to the transaction, and whether a party was given an effective opportunity to negotiate the terms of the contract.

A “consumer contract” is a contract for a supply of goods or services, or a sale or grant of an interest in land, to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

A contract is a “small business contract” if **all** of the following criteria are met:

- a.** the contract is for a supply of goods or services, or a sale or grant of an interest in land
- b.** at least one of the parties to the contract is a business that employs fewer than 20 people
- c.** the upfront price payable under the contract is no more than \$300,000, or no more than \$1 million if the contract is for more than 12 months.

The *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) contains equivalent provisions relating to financial products and services.

Neither the ACL nor the ASIC Act currently prohibit organisations from including unfair terms in the standard form contracts they use with consumers or small businesses. However, where a court finds that a term in such a contract is unfair, that term will be void and unenforceable. A court may also make a range of orders on application by an affected party or the regulator (the ACCC or ASIC).

What has changed

As mentioned above, the changes to the UCT regime under the ACL will take effect on 9 November 2023 (and the regime under the ASIC Act will also be strengthened in similar, though not identical, ways, on the same date).

The changes significantly strengthen the UCT protections under the ACL for consumers and small businesses by:

- 1. Prohibiting** the proposal or application of, or reliance on, UCTs in standard form consumer and small business contracts.
- 2. Introducing civil penalties** where these new prohibitions are contravened, with maximum penalties (per contravention) of:
 - a.** for bodies corporate – the greater of:
 - i.** \$50 million,
 - ii.** three times the value of the benefit that the body corporate (and any related body corporate) obtained and that is reasonably attributable to the conduct, and
 - iii.** if the court cannot determine the value of that benefit, 30% of the corporate group’s ‘adjusted turnover’ during the ‘breach turnover period’, and
 - b.** for individuals – \$2.5 million.

- 3. Broadening the class of contracts covered by the UCT regime** by expanding the definition of “small business contract” to include contracts where at least one party either:
 - a.** employs fewer than 100 employees (increased from fewer than 20 employees), or
 - b.** had an annual turnover of less than \$10 million for the last income year, and removing the upfront contract price threshold altogether.
- 4. Clarifying what constitutes a “standard form contract”** by:
 - a.** making a party’s previous use of the same or a similar contract a factor that a court must take into account in determining whether a contract is standard form, and
 - b.** clarifying that a contract may still be a “standard form contract” despite there being an opportunity for a party to negotiate minor or insubstantial changes to the contract terms or to choose a term from a range of options determined by the other party.
- 5. Clarifying the court’s power to make orders** to redress loss or damage that has been caused, or to prevent or reduce loss or damage that is likely to be caused, by a term that has been declared unfair, including orders to declare void, to vary, or to refuse to enforce part or all of a contract.
- 6. Introducing more flexible remedies**, including clarifying the court’s powers to make orders against a person (the “**respondent**”):
 - a.** to prevent terms that are the same or substantially similar to a term that has been declared unfair (“similar term”) from being included in any future standard form consumer or small business contracts to which the respondent is a party, and
 - b.** to redress loss or damage that has been caused, or to prevent or reduce loss or damage that is likely to be caused, to any person by a similar term that is included in existing standard form consumer or small business contracts to which the respondent is a party.

Whether or not the existing or future contracts are identifiable when the court makes the orders.

In addition, the reforms:

- 1. Exclude certain additional clauses** from the UCT regime, including clauses included in standard form contracts in compliance with, or by operation of, relevant Commonwealth, state or territory legislation.
- 2. Exclude certain additional categories of contract** from the UCT regime, including contracts that establish, contain or incorporate rules governing the operation of a payment or settlement system approved under specific legislation, contracts made in the course of or for the purposes of operating such a system, and certain contracts connected with financial markets.

What contracts are covered by the new regime?

The new regime will apply to:

- **New contracts** made;
- **Contracts renewed**; and
- **Terms** of standard form contracts which are **varied or added**, on or after 9 November 2023.

What does it all mean for businesses?

The amendments significantly strengthen the UCT regime, including by prohibiting UCTs, introducing civil penalties, and expanding the contracts falling within the scope of the UCT protections, and raise the stakes even higher for organisations using standard form contracts. The reforms also give rise to a significant risk of financial exposure for businesses if terms in their standard form contracts are found to be unfair.

Recommendations for businesses

Businesses should:

- identify their standard form contracts that might fall within the UCT regime
- carefully review their standard form contracts to determine whether any updates are required to remove or change terms that may be considered unfair
- consider whether they should provide an effective opportunity to negotiate in relation to what might otherwise have been a “standard form contract”
- consider whether they have sufficient information about their customers to determine whether they are “small businesses” within the meaning of UCT regime, and how they may implement processes moving forward to capture information about their customers (including to determine whether they are “small businesses”)

While the amendments to the ACL (and the ASIC Act) will commence on 9 November 2023, the tasks described above may well be time-consuming, so businesses should begin now.

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