

UNFAIR CONTRACT TERMS - READY RECKONER

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WHAT ARE THE KEY CHANGES UNDER THE UNFAIR TERMS REGIME?

The UCT regime is captured in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (Australian Consumer Law or ACL). For financial products and services, see the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

CURRENT REGIME

Applies to standard form consumer contracts and contracts with small businesses:

- that have fewer than 20 employees; and
- upfront price < \$300,000 OR < \$1 million for contracts of longer than 12 months' duration.

Terms found to be unfair are void - no penalties apply.

However, a court can impose penalties for any false or misleading statements about the applicability of a void contract term.

NEW REGIME - KEY CHANGES

Expands small business contract definition to:

- Fewer than 100 employees; or
- annual turnover of < \$10 million.

Note: under the ASIC Act, upfront price threshold still applies for small business contracts, but increases to \$5M. There will be no upfront price threshold for ACL.

Substantial penalties apply for proposing, applying or relying on an unfair term (in addition to broader redress).

Changes apply to contracts entered into or renewed (or terms varied) from 9 November 2023.

SNAPSHOT OF THE REGIME (INCLUDING 9 NOVEMBER 2023 AMENDMENTS)



The contract is for the supply of goods or services, or a sale or grant of an interest in land...

- **ACL consumer contract:** ... to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.
- **ACL small business contract:** ... and at least one party to the contract: makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons; OR its annual turnover is less than \$10M.



Contract must be a **standard form contract (SFC)**.

- Presumption that contracts are standard form.
- Whether contract is SFC has regard to a range of factors including whether one party had all/most of the bargaining power, whether the contract was pre-prepared, whether the contract was offered on a take-it-or-leave-it basis, and whether the smaller party was given an effective opportunity to negotiate.



Term must be **unfair**, which means:

- Term would cause *significant imbalance* in the parties' rights and obligations under the contract.
- Term is not *reasonably necessary* to protect the *legitimate interests* of the advantaged party (Note: there is a presumption that a term is not reasonably necessary unless a party proves otherwise).
- Term would cause *detriment* to counterparty (financial or otherwise) if relied on.

PENALTIES UNDER THE ACL

From 9 November 2023, each unfair term in a contract will be treated as a separate contravention of the ACL with the corporate maximum penalty per contravention being the greater of:

\$50 million

or

3 times the value of the benefit received

or

30% of adjusted turnover during the 'breach turnover period'

(Different penalties apply under the ASIC Act).

OTHER POTENTIAL CONSEQUENCES INCLUDE:



- Third parties can bring proceedings that result in the term being found void.
- Note: only ASIC and the ACCC can bring proceedings for penalties.



- Damages and other redress
- Compliance programs
- Terms being declared void
- Declarations affecting similar terms and collateral contracts
- Injunctions
- Disqualification of directors



- Disruption to business from ASIC or ACCC investigation;
- Loss of management & employee time
- Adverse publicity
- \$2.5M penalties for individuals

Note also the requirements in sections 47A and 47B of the *Fair Trading Act* (NSW) which broadly require, in connection with supplies to consumers:

- Businesses to disclose terms or conditions of contracts that substantially prejudice the customer.
- Intermediaries to disclose if they have commission or referral arrangements with another supplier.

A (NON-EXHAUSTIVE) LIST OF GUIDING PRINCIPLES



Be clear and transparent



Context is everything - a term is interpreted with the contract as a whole



Avoid applying boilerplate contracts to similar transactions (where possible)



Limit the detriment potentially caused to the counterparty



Identify the legitimate business interests that the term is trying to protect



Ensure the term goes no further than reasonably necessary than to protect the legitimate interests



Provide equivalent and/or ameliorating rights or benefits to the counterparty



What is relevant is the term (i.e. what the term allows the parties to do or not do under the contract); NOT the parties' conduct or intention behind the term