



QUAY INSIGHTS

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Unfair contract terms – a reminder to review and update standard form contracts before new laws and penalties take effect in November 2023

New laws for the imposition of penalties for unfair contract terms come into effect on 10 November 2023. Under the current law, the ACCC is required to bring enforcement proceedings to seek to have specific terms of a standard form contract ruled unfair and therefore void, and the Federal Court cannot impose any pecuniary penalties on non-compliant businesses. The introduction of a pecuniary penalties regime is intended to provide a stronger incentive for businesses to ensure that their standard form contracts are fair. An added incentive to closely consider standard form contracts is that the ACCC has announced the unfair contract terms regime is one of its priority areas for enforcement in 2023-2024.

On 27 October 2022, the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 passed both Houses of the Australian Parliament. The legislation implements two significant changes to Australia's competition and consumer laws: first, the introduction of penalties and other changes relating to the unfair contract terms (**UCT**) regime in the Australian Consumer Law (**ACL**), as contained in Schedule 2 to the Competition and Consumer Act 2010 (Cth) (**CCA**) and, secondly, increases in maximum penalties for a broad range of breaches of the CCA and the ACL, including the UCT provisions.

Simplified Application of the UCT Regime

Under the amendments that will take effect on 10 November 2023, the UCT regime will apply not only to consumer contracts but also to the supply of goods or services or the sale or lease of property, if a party to the contract is a business that employs fewer than 100 persons or has a turnover for its most recent income year of less than AUD10 million. This simplifies the previous test, which required an assessment of the value of a contract.

A pecuniary penalty may be imposed by the Federal Court under the ACL if a person proposes, applies, relies or purports to rely on, an UCT.

This publication is not intended to be comprehensive on the topics with which it deals. It is not intended to be relied upon or provide legal advice on the topic. Specific professional advice should be sought.

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LIABILITY LIMITED BY A SCHEME APPROVED UNDER PROFESSIONAL STANDARDS LEGISLATION

Standard Form Contract – Clarification of Application

The amendments clarify that a contract may still be a standard form contract if the other party has a minor ability to negotiate terms or choose provisions. The amendments are intended to make it clear that there must be a meaningful opportunity to negotiate a contract before that contract will fall outside the UCT regime.

New remedies mean that the contract provider needs to consider the use of similar clauses in other contracts

To recap, a provision of a standard form contract is unfair if it:

- causes a significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such a term; and
- would cause detriment (financial or otherwise) to a party if the term were applied or relied on.

In determining whether a provision is unfair, the Court must look not simply at the contract but also the surrounding circumstances. The Court must also consider the extent that the term is transparent to the other party as to its impact.

Under the current law, where a determination is made by the Court that a term is unfair, it is automatically void and the Court may also make some limited orders in relation to the impacted contract and collateral arrangements. Under the new remedies and enforcement provisions, the Court will be able to make a broader range of orders, as it may make orders for a whole contract, or a collateral arrangement, to be void and may also vary or refuse to enforce the provisions of the contract. The new remedies may be granted without the Court considering whether these will redress actual loss or damage.

The Court can also, on the application of the ACCC, make orders prohibiting other contract terms that are the same as or are substantially the same as a term the Court has declared in another matter to be an UCT. It is hoped that such a power will be used sparingly, as the Court will need to be cognisant of considering the application of each term to the factual circumstances in which it may be used.

New penalties applying to UCT and other contraventions

While the increases in penalties took effect for a broad range of breaches of the CCA and ACL from 10 November 2022, the new penalty regime will apply to the UCT provisions from 10 November 2023, when the other changes to the UCT regime take effect. Under the new regime, the maximum penalties that may be ordered are:

- for an individual - AUD2,500,000; and
- for a body corporate, the greater of:
 - AUD50,000,000;
 - if the Court can determine the value of the benefit to the corporation obtained directly or indirectly from the act or omission, then 3 times the value of the benefit; and

- if the Court cannot determine the value of the benefit – 30% of the body corporate’s adjusted turnover during the breach turnover period.

In recent cases regarding other contraventions of the CCA, the Australian Competition and Consumer Commission (**ACCC**) has submitted to the Court that penalties should be based on the size of the corporation and the number and value of the contracts in issue. If such an approach is taken in relation to the UCT regime, given that the regime applies to individual clauses in standard form contracts, meaning that multiple contraventions may be found in any given case, there is a prospect that the Court may impose very significant penalties if it finds that a breach has occurred.

Conclusion

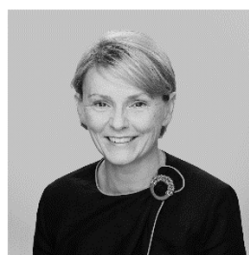
The Government provided a one-year lead time before the commencement of the UCT amendments, including the new penalty regime, to give companies time to review their compliance. Companies should therefore expect the ACCC will have limited sympathy if, should it undertake a compliance check, it finds instances of what it considers to be breaches. With the UCT regime an area of the ACCC’s enforcement focus for the current financial year, it is also expected that the ACCC will seek to enforce the new laws in one or more high profile cases.

As the new law will come into effect on 10 November 2023, we recommend that corporations carry out reviews and risk assessment in their register of standard form contracts.

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